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The Treaty of Ancon

IN THE LIGHT OF

International Law

BY

VICTOR ANDRES BELAUNDE

Professor at the University of Lima

Correspondent Member of the Royal Spanish Academy and of the Royal Academy of History of Madrid

WASHINGTON, D. C.

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To the memory of those who fell in the defense of the territories unlawfully withheld; to the patriotism of those who arose to protest against the Chilean conquest and occupation; to those who have suffered the implacable persecutions of the usurper and who because of their being faithful to Peru were driven from their homes and expelled from the native land; to all of their children who, although born under a foreign flag, have not renounced nor shall ever renounce the flag which they received from their parents; I dedicate these pages written in the midst of the emotions of these historical moments and with the painful vision of the unfortunate and far away motherland.

V. A. B.

Evidently written (published?) sometime between 1921 and Harding's death on — 1923. I think likely in 1922. Cf. pp. 27, 91, 96, 105, 106

~~I think it must have been in 19— — for better information~~

check p. 106

THE TREATY OF ANCON

ITS ORIGINS AND VIOLATIONS IN THE LIGHT OF INTERNATIONAL LAW : : : :

CONTENTS

PAGE.

The Treaty of Ancon—Its Origins and Violations in the Light of International Law 5

CHAPTER I.—The Treaty was Entered Into with a Government which did not Represent Peru 7

CHAPTER II.—The Cession of Tarapaca was the Consecration of a Conquest 18

CHAPTER III.—The War Indemnity and the Cession of Tarapaca 32

CHAPTER IV.—Tarapaca Passes Without Debts to Chile 37

CHAPTER V.—Chile's Purpose of Not Establishing Definitive Peace on Opening a New Problem 42

CHAPTER VI.—The Treaty of Ancon was a Unilateral Imposition and an Instrument of Oppression 51

CHAPTER VII.—Chile Violates the Very Treaty Which It Imposed 57

CHAPTER VIII.—The Indivisibility of the Treaty of Ancon. Its Total Nullity Due to the Violation of the Third Clause 74

CHAPTER IX.—The Juridical Solution of the Problem Created by the Violations of the Treaty of Ancon 93

THE TREATY OF ANCON—ITS ORIGINS AND VIOLATIONS IN THE LIGHT OF INTERNATIONAL LAW.

The war of the Pacific started with the most flagrant violation of International Law, namely, the occupation of the Bolivian coast on the 11th of February, 1879, and the breaking out of hostilities against Peru when the latter proposed to Chile the arbitration established in the treaty of 1875.

The inflexible logic of evil led Chile to violate in the prosecution of the war, not only the rules of international law but the most elementary principles of the Christian civilization.

The war, which had no cause other than to despoil Peru and Bolivia of their principal riches, ought, according to Chile, to be waged by extreme and violent means, and procuring, at any rate, not the victory which is the licit end of the struggle but the destruction and the annihilation of Peru.

This affirmation is confirmed not only by the testimony of the neutral historians such as Markham and Caivano but also by the testimony of the Chilean historians, and principally by the documents collected by the assiduity of the Chilean historiographer Ahumada Moreno.

The moral consciousness of the continent has formed on them. The war born of guilt, developed in the midst of guilt and crimes, had to end with a peace which should also be a crime. The treaty of Ancon has a bond of logical correspondence with the attitude of Chile on initiating the war and carrying it on. As the annals of America do not record a

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more iniquitous war, its diplomatic history does not register a more monstrous peace. The treaty of Ancon, in its spirit and in its letter, constitutes the most evident contradiction of all the principles of the international science.

To demonstrate the foregoing through a minutely precise analysis is the object of the present work.

Chapter I.

The treaty was entered into with a government which did not represent Peru.

Doctor Alzamora has proved, in the brief presented by the natives of Tarapaca to President Harding, that the war ended at the moment when Peru lost the "Huascar." If Chile had had honest purposes of peace it ought to have proposed it at that moment. But as its aim was the unlawful appropriation of the Peruvian coast of Tarapaca, it proceeded to occupy this territory, moving afterwards into Tacna and Arica.

The occupation of those provinces having been consolidated, it was naturally to be presumed that Chile should propose the peace. The American government believed so when it offered its good offices which were reflected in the fruitless conferences on board the "Lackawanna." But as Chile did not wish the peace but the annihilation of Peru, the conditions proposed at those conferences, in order to cause them to fail, were monstrous. The so-called campaign of Lima was then started, the clear object of which was the destruction of the capital of Peru, which was prevented only by the intervention, so often remembered, of Admiral Du Petit Thuars.

The Pierola government which had battled with the Chilean armies at the gates of Lima, although of revolutionary origin, evidently represented the popular will and counted on its support in the task of organizing the resistance which it effected in spite of the maritime blockade and the almost absolute lack of economic resources. Notwithstanding its

dictatorial character, explained by the necessities of the war, Mr. Pierola's government was the genuine representative of Peru. The taking of Lima did not deprive it of that character. The Peruvian Dictator on withdrawing to the sierra to continue the resistance there, as did the Spanish authorities after the evacuation of Lima, was not deprived of any of the attributes of the authority which he exercised. All of Peru, excepting the zones occupied by the invader, continued to obey him. As the Government of the Public Defense represented France in the war of 1871, the dictatorship of 1880 represented Peru. The occupation of Lima, the constancy and the boldness of the Dictator being known, could not result in the anarchy nor the acephalism of our country. The Pierola government had been recognized by all the foreign powers and by Chile itself. The discussions on board the frigate "Lackawanna" had been carried on with the agents of that government. The new peace negotiations ought to have been carried on with the agents of that same government.

But although the Dictator appointed Messrs. Arenas Irigoyen and Alarco as his plenipotentiaries, the Government of Chile, believing itself the arbiter not only of the victory but of the political destinies of Peru, refused to deal with them, ignoring the only authority that existed in Peru.

The belligerent may be rigid in its conditions and, if they are not accepted, may continue the hostilities; but there is certainly no author of treatises, historian, nor man of common sense who give to the victorious country the unusual prerogative of deciding

as to the legitimacy or illegitimacy of the government of the vaquished country. In the present case Mr. Pierola's authority to negotiate the peace had the supreme consecration of the facts; the definitive title which the effective resistance which he had opposed and continued to oppose to the invader gave it.

When after the battle of Sedan the Government of the Public Defense was formed, and, the defense of Paris having become impossible, it moved to Bordeaux, the German Government did not think of intervening in the political affairs of France, it accepted the fact and the right of the government of Bordeaux and negotiated the peace with it. This simple comparative recollection causes us to project in full relief the unqualifiable attitude of Chile on having refused to negotiate with Pierola. Let us see what international law says:

> Moreover as no State may interfere in the internal affairs and constitutional organization of another State, it may not, as a rule, demand from a party possessing and exercising sovereign authority what title it has to conclude international engagements; for the undisturbed possession and exercise of such authority may be regarded as definite proof of contractual competence. . . .—Colleman Phillipson, "Termination of War and Treaties of Peace," p. 159.

Chile's attitude on having refused to deal with Pierola represents, therefore, a deed without precedent in the diplomatic history of the world, and the clearest violation of the rule which we have quoted.

What reason did the Chilean government give for refusing to deal with the Pierola government? The

following pretext was invoked: The Secretary of the Dictatorship, Mr. Aurelio Garcia y Garcia, had made the most serious inculpations against the Chilean military command regarding the violation of the Miraflores armistice. The said pretext shows its true meaning by itself. Governments, on account of war, address reciprocal charges to each other. These charges were never a reason for preventing peace conferences.

The true cause of Chile's attitude was the conviction that the instructions given to the dictatorship's plenipotentiaries did not permit them to cede territory, and the certainty that Pierola was going to continue an efficient and powerful resistance without yielding to the exigencies of the conqueror.

The illusion arose then in Chile that the great desire of peace, stronger than in the capital of Peru, as was natural, than in the rest of the territory, should result in the formation of a new government and that that government should yield to the Chilean exigencies. But Chile was mistaken. It is true that the notables of Lima, on forming the government called the government of Magdalena, had as a definite program to save Peru from the horrors of territorial invasion and from the continuation of the hostilities; but they never had the purpose of creating an instrument docile to the Chilean plans. Happily for the honor of Peru that government was presided over by don Francisco Garcia Calderon, a man as great for his intelligence as for his patriotism.

If Pierola had the plan of resisting the Chilean exigencies by continuing the war, Garcia Calderon,

statesman and diplomat, had to conceive the same ideal, employing different means, on the basis of the moral support of the great Republic of the North, the sympathies of which towards Peru were known, although they had not until then had efficacious manifestations. The Garcia Calderon government looked upon at first with indifference by the Peruvian communities, due to the mistaken belief that it represented peace at any cost, began to attract public opinion from the time when it became notorious that its program could not contain the renunciation of Peruvian territory nor the acceptance of the Chilean impositions, and that it involved, on the contrary, a vast diplomatic plan destined to save the territorial integrity of Peru.

And just as Chile refused to deal with Pierola when it knew of his refusal to cede the territory, it did not hesitate to commit this other offense against international law as soon as it learned that Garcia Calderon, already recognized by the United States, was not disposed to cede an inch of national territory. To the astonishment of the nations of America the provisional President was taken prisoner and carried to Chile.

The imprisonment of Garcia Calderon was not going to produce the acephalism of Peru as Chile intended.

The country having been won over to the diplomatic plan of the American mediation, the Peruvian military chiefs who obeyed Pierola decided to continue the resistance under the new government which was formed. Montero, commanding officer of the

North, accepted the first Vice-Presidency of that Government, and General Caceres, commanding officer of the Center, accepted the second Vice-Presidency. Montero, after having taken possession as head of the Government, went from Cajamarca to Huaraz and from Huaraz to Arequipa. The departments of the North remained under the orders of General Iglesias, and, as the country was unified under the leadership of Pierola, it remained unified also under the new government which exercised the effective authority in all the territory of the Republic.

International law clearly imposed on Chile the duty of entering into peace negotiations with the Garcia Calderon-Montero government. Far from following that policy Chile preferred that of exerting pressure on the imprisoned President, refusing at the same time to accede to the latter's legitimate pretension of returning to Peru and calling together a national assembly which should discuss and ratify the bases of the peace.

That pressure was exerted through Plenipotentiary Logan whose conduct was entirely favorable to Chile. It was desired to obtain, at any rate, a treaty of peace signed by Garcia Calderon in circumstances comparable only to those in which Francis I, after Pavia, was a prisoner in Madrid.

If every treaty of peace evidently involves the coaction of force, the latter becomes more grave to the point of constituting an effective cause of nullity of the agreement when it falls on the negotiators. Garcia Calderon refused to accede to the Chilean pre-

tension, pointing out the only road which science indicated, namely, that of discussing the bases of the peace after having been restored to his authority and with the sanction of an assembly which should represent the national will of Peru as the Assembly of Bordeaux had embodied the national will of France in the peace negotiations of 1871. Chile did not wish to follow the straight course although the point which most interested it in the making of the peace was saved; the Congress of Arequipa, that is, the legislative branch of the Garcia Calderon-Montero government had resolved to accede to the cession of Tarapaca. The attitude of Chile was caused by its new exigency concerning the Peruvian debts and the occupation of Tacna and Arica, and had besides a purpose which was none the less effective because unconfessed. This purpose was to throw Peru into anarchy; to break the bonds which bound it to Bolivia and which the Garcia Calderon-Montero government had succeeded in maintaining, and to render impossible the consolidation of a strong and respectable government which should be able to accomplish the national reconstruction. It was necessary to carry out the program of destruction and annihilation of Peru by means of violence, of intrigue and of political intervention.

The plan was carried out: the departments of the North gathered in an assembly resolved in favor of the peace. The Government of Chile encouraged the program of the Peruvian leader who called together that assembly, giving to understand that it would recognize the government which it should con-

stitute and presenting at the same time difficulties in the way of negotiating with the Arequipa government.

It is not true that the peace was not made because Peru lacked a government with which Chile might deal. Peru had had, from 1880 to 1882, governments recognized by the entire country and with jurisdiction over the territory not occupied by the enemy: first Pierola and afterwards the Garcia Calderon-Montero government.

It was not the duality of governments in the year 1882 that prevented the peace, but, on the contrary, it was the Chilean purpose of not making the peace with the effective government that caused the duality which arose afterward's. Montan's manifesto would not have been issued and the Assembly of Cajamarca would never have resolved to organize a new government if Chile had been determined to deal on the bases of international law with the government which existed in Peru and of which the chief of the departments of the North was a part.

Chile expected that this leader should accede to all its conditions. It was mistaken once more. On the essential point relative to Tacna and Arica, Iglesias remained intransigent as the Garcia Calderon-Montero government, accepting, in lieu of the occupation and arbitration, the occupation and the plebiscite.

The government of General Iglesias did not legitimately represent Peru. Of the twenty Peruvian departments, only seven were under his command, and of these four were occupied by the enemy. The

nucleus of the nation, constituted by the communities of the Center and of the South, obeyed other authorities. The action of the Iglesias government could be extended only through Chile's influence, and, even from the economic point of view, depended upon the Chilean authorities. If it is true that, excepting the aforesaid, they did not exact of Iglesias conditions greater than they exacted of the other leaders, the object of Chile in recognizing him and dealing with him was to maintain its influence in Peru for some time and to produce that which had to follow, namely, civil war.

The aim of the Chilean diplomacy appears clearly. It was not the peace and to obtain the title which should legalize the conquest of Tarapaca and the occupation of Tacna and Arica. Something more was desired: to produce, after the ratification of the peace, civil war in Peru. This aim was accomplished. The national sentiment overthrew Iglesias, thereby furnishing clear proof that his government was illegitimate. Authority is of essential importance in case of international agreements. Phillipson says in his aforementioned work:

> "When peace negotiations are conducted with a revolutionary Government, the question as to its competence to bind the nation by a treaty may arise. In such circumstances, there can be no doubt that the existing Government de facto may validly bind the nation by means of conventions with other Powers, and particularly by peace treaties, if the said Government and its acts are sanctioned by a national assembly recognized explicitly or tacitly by the people at large." (Page 159.)

The authority of a government is judged by the material criterion of the territory over which it exercises its jurisdiction, and by the moral criterion of its support in the public opinion and in the national sentiment. From these two points of view it can be affirmed that the Iglesias government was not the de facto government in Peru. Its decrees were not respected but in the territory occupied by the conqueror and the popular will was always hostile to it. The assembly called together to ratify the treaty and gathered hurriedly was the fruit of imperfect and simulated elections; no real elections were held in almost all the provinces of Peru.

To understand that, in this process of peace, the attitude of Chile, in pursuance of machiavelian plans, was contrary to international law, it will suffice to compare it with the attitude of Bismarck twelve years before, without forgetting that the Iron Chancellor is not the most perfect example that can be mentioned of respect for the practices of international law. We read in Phillipson:

> The Government of National Defense—a Government de facto from the latter date—having commenced pourparlers, early in January 1871, for the conclusion of a general armistice, with a view to the establishment of peace, Bismarck first demanded (in a note of January 14) that this Government should be formally recognized by a National Assembly of representatives of the French people, in order that its engagements might not afterwards be repudiated as the acts of an incompetent body. (Page 159.)

The Government of Chile ought to have procured, on the same date on which it initiated its negotiations with Iglesias—March 1883, that an assembly composed not of the representatives of the occupied territories but of the representatives of all the Peruvian people should pass upon that Government and upon the bases which it had agreed upon; but Chile did not wish to follow that line of conduct. It had rejected it when Mr. Garcia Calderon clearly proposed it and did not put it into practice regarding Iglesias because it did not wish, in any form, the unification of Peru under the direction of an assembly which should really personify the national will. It preferred to deal with a leader subjected to its influence and was satisfied with the treaty wrested by force which only a diminutive and apocryphal assembly approved afterwards contrary to the national sentiment.

Chapter II.

The Cession of Tarapaca was the consecration of a conquest.

The treaty of Ancon is considered as a typical territorial cession treaty, but on account of its process and its spirit it ought to be classified as a consecration of conquest treaty.

The second article of the treaty says, literally:

> "The Republic of Peru cedes to the Republic of Chile perpetually and unconditionally the territory of the littoral province of Tarapaca the boundaries of which are, etc."

It has been sufficiently proven that although it is true that Tarapaca was Chile's war-objective, it was never the object of the dispute in which the struggle originated. Everyone knows that the subject matter of the dispute was the Bolivian coast.

The cession of territory which has been an object of the dispute which produced the war is conceivable, but the incorporation in the conqueror of territories foreign to the struggle and which did not even adjoin those of the victorious country can never be made to appear honest. The case of Tarapaca appears as the typical example of territorial conquest.

All the treatise writers concur in condemning conquest. Even those who abide by the criterion of facts and who belong to the positivistic school of international law consider territorial annexations contrary to the principles of absolute justice and to the practical ideal of the preservation of peace itself. Territorial cession is admitted only in

case of extreme necessity when a country has no other means of obtaining its liberation or is incapable of paying a war indemnity.

This was not the case of Peru with respect to Tarapaca. It is evident that, in view of the immense riches which Tarapaca possessed, Chile could have accepted a war indemnity with occupation as a guaranty, and that indemnity could have reached the highest sum. The argument with which Chile, through the mouths of its statesmen, at the time of the treaty, and, later, through those of its defensors, has wished to justify the cession is, therefore, groundless.

Balmaceda in his discussions with Trescott insisted that it was impossible for Peru to pay war indemnity. The fabulous wealth which Chile has extracted from the Peruvian coast has belied the affirmation of that Chilean notable. Tarapaca has paid, by way of taxes on saltpetre alone, an indemnity greater than that paid by France to Germany as a consequence of the treaty of Frankfort. Aside from that consideration, to definitively establish that the cession of Tarapaca was not exacted as a substitute for a war indemnity but to satisfy purposes of conquest and of territorial expansion, it will suffice to refer to the session of the Chilean Chamber of Deputies in which all the Deputies affirmed the right of conquest which, according to them, supported Chile in regard to the regions which it had occupied. Now, then, if the cession of Tarapaca cannot be presented before international law as a substitute for a supposed impossible war indemnity, it is evident that

it appears to the eyes of the internationalist with the characteristics of an annexation based principally upon imperialistic purposes. Phillipson says:

> "It is now held universally that forcibly to deprive a people of territory without good and sufficient cause is a violation of right and justice. The accepted body of international jurisprudence does not cover and provide for all possible international relationships and every species of proceeding. It is urged that other considerations—for example, honor, fairness, equity—apply, and must perforce govern the conduct of the civilized society of States. These principles are fundamental. There is no need to consult codes and conventions to find them; they are implanted in the consciousness of mankind, and can never be eradicated."—Termination of War and Treaties of Peace, 1916, p. 29.

Fiore says:

> "The conquest of a territory cannot be in itself a sufficient reason for exacting the cession of the conquered territory when the right of the conqueror does not exist. The conqueror can impose that cession when it be justified by evident conditions of morality or by the general interest of insuring peace."—Nouveau, Droit Internationale Public, 2nd Ed., Paris 1880, Par. 1696.

The same writer who is perhaps the authority that has best expounded the point relative to the morality or justification of territorial cessions has summarized his thought in the following rules:

> "Second: That the stipulation of a territorial cession without taking into account, principally, the historical and ethnographical rela-

tions and, secondarily, the necessity of security and of defense, must be considered contrary to honor, loyalty and international morality."—Fiore, Diritto Internazionale, 1905, p. 389.

The juridical consciousness of the world has already crystalized regarding this matter. Nowhere is that consciousness clearer than on the American continent. The principal countries of America have always manifested themselves opposed to conquest. The principle of the uti possidetis had been established among the hispanic-American countries to avoid the annexation of territories by force. All boundary questions were to be settled in accordance with it. These delicate litigations thus had an arbitral or transactional solution. The examples of wars in America, prior to that of the Pacific, show us that the principle of conquest was excluded from the American public law. When the war of 1829 between Peru and Colombia ended the two countries limited themselves to agreeing upon the acceptance of the principle of the uti possidetis for the fixation of boundaries; and in the Paraguayan war the winners respected the territorial integrity of Paraguay formulating the principle that victory gives no rights. The condemnation of Chile's purposes of conquest by all the countries of America was not, therefore, in the light of these precedents, surprising. Owing to the Peruvian-Chilean conflict, Argentina and Brazil offered their mediation on the exclusive basis of the payment of the expenses caused by the war and of the indemnity for the damages caused by the same. The Congress planned by Colombia was based on the

same principles. The United States were even more explicit. Minister Hurlburt said that the United States were not disposed to recognize on this continent the European concept which authorizes territorial expansion by means of conquest. The bases of Blaine's instructions to Trescott established that the annexation of Tarapaca was not compatible with justice; that the negotiations ought to be opened without the annexation's being necessary as a condition precedent, and, finally, that the United States would consider the imposition of an extravagant indemnity which should make the cession of territory unavoidable for its satisfaction as an exigency which was not justified by the expense which the war had occasioned to date, and as a solution which threatened to renew again the difficulties between both countries.

Those reproaches of the conquest planned by Chile were repeated in the most august form in the year 1890, that is, seven years afterwards, in the first Pan-American conference held at Washington. The resolution adopted by all the countries except Chile constituted the verdict of the entire continent regarding the crime committed in 1883, and established perfectly the incurable vice of the treaty of Ancon. That resolution said:

> "First, the principle of conquest shall not be recognized as admissible under American public law during the continuation of the treaty of arbitration. Second, the cessions of territory made during the continuation of this treaty of arbitration shall be null if made under the threat of war or the presence of armed forces.

Any nation on which those cessions may have been imposed may petition that their validity be submitted to arbitration."

The only thing that can justify a territorial annexation is its approval by the inhabitants of the territory which it concerns. Phillipson has summarized as follows the bases of the principle of self-determination:

"It is argued, too, that the right of the stronger ought not to be allowed to prevail, that the conditions are now different from those existing in earlier ages when such a right was universally exercised, that public opinion has changed, that the general democratic movement is to be taken into account, that popular suffrage is now almost everywhere the fount of political authority, that the sovereignty of the people is now the governing factor in the political and social life of nearly all civilized States. Why —it is asked—should the people of a given territory be handed over to another State, deprived of their old citizenship (and perhaps of their nationality, if they are not allowed to exercise the power of option), and of all their old associations, without consulting them as to whether they approve of the change?"—Termination of War and Treaties of Peace, 1916, p. 282.

Walter Frank Phillimore, in his recent work, "Three Centuries of Treaties of Peace," confirms anew this idea in the following words:

"But the deterrent penalty should not take the form of depriving States of population and territory without regard to the wishes of the population of the ceded territory, or without due consideration of geographical limits.

> "It must be remembered that we are not, as in times past, dealing with monarchs as if they were proprietors who could be made to cede portions of their estates. The days of Patrimonial States are past. We are dealing with peoples and nations. They must suffer, no doubt, for the wrongdoing of their Governments; but they should not be permanently severed from the country to which they are attached, nor put in subjection to an alien rule merely in order to punish their former country for engaging in war."

If this is the principle which Walter Frank Phillimore invokes as applicable even to the very countries responsible for the war, with how much more reason must that rule be invoked in the case of a country such as Peru which was the victim of the Chilean aggression prepared since many years back. In accordance with the principles of international law, territorial dismemberment cannot be accepted even as a penalty: even less can it be justified if it is to fall on the innocent country.

Since the time of Vattel, the will of the inhabitants was considered as of principal importance in the transference of territories. That author maintained that these inhabitants were not bound to accept the cession if they were capable of resisting.

In spite of the objections which some treatise writers oppose to the ratification of the territorial cession by the vote of the inhabitants, the ideas in this regard have been becoming firmer day by day to the point of the principle of self-determination's being one of the fundamental bases of the modern public

law. In the light of these ideas, we adjudge imperfect the plebiscites which were simply a formality to give a cession an honest appearance, and we condemn the cases in which those annexations have been accomplished even without a false plebiscite.

No one has condensed better than Foulke the present state of the international science in this respect. Let us hear his words:

> 243. Territory was transferred by the monarchs of Europe voluntarily or by conquest without regard to the wishes or convenience of the inhabitants of the territory in question, who were regarded as so many chattels to be handed around as suited the conveniences of their royal masters. However, the growth of democracies and the increased potency of the voice of the people in state affairs have formed a basis for the idea that the inhabitants of the territory should be consulted before their territory is transferred from one state to the other; that it is contrary to humanity and the individual interests of man to forcibly tear a community from the political power of one state and hand it over to another without giving the inhabitants any say in the matter.—International Law,—Foulke, Volume 1, 1920, p. 318.

In the case of Tarapaca, the cession took place not only without consultation of the will of its inhabitants but against their express will. Immediately following the making of the treaty the natives of Tarapaca addressed to the civilized world the most solemn protest affirming their right of self-determination. That protest says:

> "Not to recognize nor to accept as valid any treaty which Peru may make in which the ces-

sion of our department to Chile or to any other State be stipulated, which ever be the Peruvian Government that make it and the source whence its authority emanate.

"To remain faithful to the Peruvian laws; to respect the dispositions of Peru's recognized authorities and to follow the common lot which is reserved to Peru in this or any other emergency as long as the principle of territorial integrity established in the State constitution be not tampered with."

They ended their protest reserving the right of defending their nationality. There is no room for making the argument that the impossibility in which the natives of Tarapaca found themselves of resisting by force the Chilean authorities constituted in that territory could signify a passive assent to the annexation. Answering Bluntschli, Nys has said very well, in his "Droit International," 1912, p. 22:

"The obedience to the new government cannot be interpreted as constituting assent to the established order of things. It has its explanation in the transference of domination; it is obligatory and does not imply approval nor disapproval by the subjects."

In the case of Tarapaca, the administration and exploitation of those territories by Chile always gave rise to the protest of the natives to the point that the Chilean Government decided to take violent measures against them, persecuting them individually, or expelling them en masse. In recent times, those protests took on an explicit character. They have been embodied principally in the cablegram which the natives of Tarapaca addressed to President Wilson

in February 1919, and in the Memorial signed on the 6th of April this year, addressed by them to President Harding.

The protest of 1884 and the last mentioned documents have an indissoluble logical correspondence. They are the obvious proof that in spite of the lapse of the forty years since the conquest the latter has not been able to drown nor to extinguish the sentiment of nationality.

International law records interesting examples of territorial cessions in the Nineteenth Century. A slight parallel of these cessions with that embodied in the treaty of Ancon will serve to better set off the marks of immorality and of injustice which characterize the latter.

The cessions made by the treaty of Paris in the year 1815 at least had the pretext of the scurity of the frontiers which were believed to be menaced by the French imperialism.

The territorial transformations made by the treaty of Paris of 1856, far from involving a conquest, restored a prior condition and consecrated the principle of nationality in the principalities of the Danube.

The treaty of Vienna of 1866, by which the Emperor of Austria accepted the union of the Lombardo-Venetian Kingdom to Italy had the same character.

The treaty of Frankfort of 1871 gives the example of conquest or of territorial annexation by force which most nearly approaches that of the treaty of Ancon. Some essential differences appear, how-

ever, which present, in a graver aspect, the violation of international law which was committed against Peru. It has been recalled with exactness that Alsace and Lorraine belonged to the German Empire and that in any case they were territories adjoining that empire.

Pursuant to a resolution of the Congress of Berlin Austria-Hungary occupied Bosnia and Herzegovina. In the year 1908 the dual monarchy annexed those provinces. That act has been one of the antecedents of the last war. Bosnia and Herzegovina are today parts of the Jugo-Slavian nation.

By the treaty of Shimonoseki of 1895 some Chinese territories were ceded to Japan forever and with complete sovereignty. No one ignores that those territorial cessions have given rise to the problems of the Far East concerning which the Disarmament Conference has established a truce and which, nevertheless, contain germs of discord for the future of humanity.

The treaty of Constantinople of 1897 did nothing more than to restore to Greece the village of Kouchufiani which formerly belonged to it.

The treaty of Paris of 1898 between the United States and Spain did not result in the annexation of the Island of Cuba to the United States but, on the contrary, in the freedom of said island and its entrance into the concert of the hispanic-American nations. The United States paid twenty million dollars for the Philippine Islands, and it is understood that as soon as circumstances may permit it, full autonomy will be granted to said Islands. So

the only territorial annexation worthy of being mentioned as regards said treaty would be that of Porto Rico destined to be sooner or later a free State of the American Union.

The treaty of Portsmouth of 1905 between Russia and Japan resulted in the cession to the latter country of the southern part of the Sakhalin Island and some neighboring islands.

The treaties of London, Bucharest and of Constantinople of 1913 consecrated territorial transferences all tending to integrate the nationalities which were before subject to the Turkish Empire.

It appears from this slight account that the cessions of territories resulting from war have been, in the majority of cases, in favor of the principle of nationalities. Only the annexation of Alsace and Lorraine and the annexations imposed on China and Russia and that of Porto Rico have contradicted this rule.

None of these cessions has had for the dismembered countries the importance that Tarapaca had for Peru. The territories ceded in the most analagous precedents were not essential parts of the economic and political organism to which they belonged, excepting Alsace and Lorraine, which have been restored as a consequence of the last European war.

It must be borne in mind, in appreciating what the cession of Tarapaca meant for Peru, that Peru's principal source of resources was the saltpetre deposits of Tarapaca, its coast being arid, the exploitation of the sierra being difficult and the montana almost inaccessible. Peru needed enormous capital

to irrigate its coast, to dominate its uneven territory by means of railroads, to initiate the exploitation of its mines and to unite the forest region to the populated centres. The riches of Tarapaca constituted the guaranty of its foreign debt which was considerable, and the capital indispensable for carrying out those gigantic works without which civilization was impossible in the face of the immense obstacles caused by the geographical factors. So the loss of Tarapaca did not, therefore, involve only a territorial mutilation and a diminution in the population; it was a death-blow given to the economic life and to the development of the civilization of Peru. We can, therefore, state, without circumlocution, that history does not record a case of territorial annexation of more serious or graver consequences for the vanquished country.

Some Chilean writers have made special mention of the annexation of New Mexico, California and Arizona among the cases of conquest that could be cited as precedents for the annexation of Tarapaca. It is true that the treaty signed in Guadalupe Hidalgo in 1842 consecrated the incorporation in the American Union of territories unquestionably recognized as Mexican, and that the Government of the United States paid for them the insignificant sum of fifteen million dollars. The historians of the Great Republic agree that the war with Mexico which that treaty liquidated was a war of aggression and they agree on the character of conquest which said cessions had. It is not, therefore, possible to invoke, in accordance with the moral criterion of those writers,

the precedent from the point of view of international justice. Things will have to be judged from the point of view of results. It is true that the immense and rich territories of Arizona, California and New Mexico were taken from the Mexican Republic by force, but it is no less true that those territories did not signify for the life of Mexico, at that historical moment, what Tarapaca represented for the life of Peru. The conquest which carried the boundaries of the American Union to the Rio Bravo was the center where a new civilization developed and where the excess emigration from Europe converged resulting in the formation of new human groups. In the case of Tarapaca, things have happened in a very different way. Tarapaca has not served as the convergence center of human masses which needed the benefit of free land. It has been only the basis of the most sordid capitalistic exploitation or the source of fiscal wealth for the Government of Chile which it has utilized to militarize the country, pursuing an imperialistic policy, to start in America the naval armaments competition and the policy of hegemony. The settlers and pioneers who have come from all parts of the world have benefited by the annexation of New Mexico, California and Arizona; only the oligarchical and militaristic caste which directs the destinies of Chile has benefited by the annexation of Tarapaca.

Chapter III.

The War Indemnity and the Cession of Tarapaca.

Although the treatise writers deny to the victorious country the right of conquest, they grant it the right of collecting an indemnity for the expenses incurred.

Phillipson says in his so often cited work:

> "Nearly all jurists, both the earlier and the modern, agree that a victorious State is justified in demanding a pecuniary indemnity as a means of making good the losses incurred during the war. But the mode of calculating the amount presents the greatest difficulty, for not all the losses incurred and damage inflicted can be made good. It may be possible to arrive at a fair numerical estimation of the expense of the material losses, e. g., territory devastated, property destroyed, cost of mobilization and maintenance of the armed forces; it may be possible even to calculate the amount necessary wherewith to grant pensions or aid to the wounded, and to the widows and orphans of those who have fallen. But it is not possible to estimate in figures the sufferings, physical, moral and mental, of combatants and non-combatants alike; and also the indirect damage inflicted on the general fortune of the State, on its social, industrial, and commercial organization. It is thought, therefore, that as war is a method of settling international conflicts, the victorious party is entitled to be reimbursed for the direct losses and expenses caused by the war—which the victor assumes to have been undertaken by him for the sake of seeking just redress; but that the exaction of damages for indirect, incalculable losses is not justified, in-

asmuch as it would entail an arbitrary calculation and might well become a means of enriching the victor and impoverishing the vanquished. As MM. Funck-Brentano and Sorel remark: 'Outside of these reparations very strictly determined, the war indemnity is always the result of an arbitrary valuation, and always has, more or less, the object of enriching the victorious and of impoverishing the vanquished.' In the proper sense of the term, then indemnity is neither ransom nor a penalty for an offense; it is a pecuniary reparation for actual and specific damages and extraordinary expenses brought about by the prosecution of hostilities." —Termination of War and Treaties of Peace, p. 269.

In accordance with these principles all the indemnity claims which make out of war a simple business are immoral and unjust. Calvo referring to the enormous sum demanded by Prussia of France after the war of 1870 said the following:

"In the face of these enormities there is room for asking one's self where this ever increasing progression will stop. One conceives to a certain extent that a victorious enemy may pretend to cause itself to be indemnified by its vanquished adversary for the expenses which war has entailed, especially if it has not provoked the war; but it is far removed from that to make exigencies out of all proportion with the most reasonable calculations, exigencies rather adequate to ruin the country to which they are addressed and to prolong the evils of war after the actual cessation of hostilities. Isn't there room here for a moderating and conciliatory intervention? Why should not this liquidation of accounts be submitted to a disin-

terested, equitable and impartial arbitration?—City by Phillipson in "Termination of War and Treaties of Peace," at p. 272.

If Calvo emitted these opinions concerning the indemnity exacted of France, what would the illustrious Argentine author have said if he had known the economic result of the war for Chile as a consequence of the annexation of Tarapaca!

In the peace negotiations, Peru repeatedly proposed that the indemnity which it would pay as the vanquished should be submitted to arbitration. Chile rejected this proposal and exacted the territorial cession as indemnity; at least that was what the diplomatic documents said. It used a different language within the country. Its public men confessed, as we have already recalled, that it was the case of a conquest.

In accordance with the Chilean official documents the war expenses amounted to seventeen million pesos. Chile has confessed that it has received as taxes on saltpetre alone the sum of one hundred and fifty million pounds.

According to Dr. Maurtua's calculations the amount paid by Peru up to the year 1900 reached two thousand three hundred and fifty million pesos, and what Bolivia has paid may be estimated at six hundred and fifty million. Comparing this indemnity with that paid by France it follows that each inhabitant of France contributed one hundred and thirty francs to the indemnity paid to Germany whereas in Peru the proportion is fourteen hundred and eighty francs per capita. Dr. Maurtua adds:

"In France the indemnity of five billion francs represented less than the total amount of public expenses during two years; in Peru, where a year's budget amounts to thirty million francs, it represents the expenses corresponding to one hundred and forty years."

The Chilean newspaper "El Heraldo" has calculated the indemnity as follows:

"Peru has paid Chile an indemnity several times greater than that paid by France to Germany. The saltpetre deposits of Tarapaca have yielded to it in taxes upwards of thirty million sterling pounds or one hundred and fifty million dollars. Accepting the most moderate calculation made of the duration of the saltpetre deposits in their richest and most easily exploitable part which is fifty years, a surprising figure is arrived at. The afore-mentioned annual revenue is now in the neighborhood of thirty-eight million. Multiply this sum by the fifty years calculated and the colossal sum of nineteen hundred million pesos results which added to those already received exceed two billion pesos, ten billion francs or twice what Germany exacted of France to the world's astonishment." —Documentos Esenciales del Debate Peruano-Chileno-D. 47.

The foregoing calculations have been made considering only the direct benefit of the fiscal revenue without taking into account the indirect benefit of the exploitation of that immense riches without which Chile could not have acquired the military elements which present it as one of the principal powers of Hispanic-America.

Everything is extraordinary and abnormal in this interesting historical case. The causes of the war,

the prosecution of the same, the conditions of peace and the indemnity. The professionals of diplomatic history have to make a separate chapter out of the precedents of the Peruvian-Chilean struggle. The originality of the case as regards Chile consists in that it has been entirely contrary to what international law established. It is the most interesting case not only due to the extent or to the number of the violations committed against international law but due to its intensity and transcendence. The war changed entirely the conditions of the two countries. Peru remained impoverished and annihilated and Chile suddenly reached the highest degree of opulence.

Chapter IV.

Tarapaca Passes Without Debts to Chile.

Peru's foreign debt which, in round numbers, amounted to forty million pounds, was secured by the guano and, principally, by the saltpetre from the time when guano began to diminish. This security existed not only because it is a general rule that the debtor's property and fount of resources are subject to its debts but because the guano and the saltpetre were expressly subjected to the payment of the foreign loans by acts of the Government of Peru.

The mortgage of the Peruvian saltpetre and guano to the foreign creditors was clearly established prior to the outbreak of the war.

This fact was perfectly well known to Chile. Thus is it explained that the Minister of Foreign Affairs should have solemnly declared in 1881, in the report of that year at page 86, that the cession (he refers to that of Tarapaca) involved, for the victorious country, the acknowledgment of all the mortgage encumbrances constituted by the Government of Peru.

But in spite of the emphatical nature of this obligation which, moreover, did not involve anything but the application of an elementary rule of international law, the Government of Chile, when the negotiation of peace with President Garcia Calderon was taken up, completely refused to stipulate the aforesaid acknowledgment in the treaty.

General Iglesias in his desire of having peace without sacrificing Tacna and Arica decided to ac-

cede to the condition which Chile exacted as most important, namely, the cession of Tarapaca free of encumbrances. It was then agreed that Chile would assume only the responsibility or obligation stated in the decree of February 9, 1882, concerning the sale of a million tons of guano out of the proceeds of which Chile was to offer fifty per cent only to the creditors of Peru.

Article 5 of the treaty established the following limitation on the rights of Peru:

> "If new guano beds or deposits should be discovered in the territories which remain under Peruvian sovereignty, in order to prevent that the Governments of Chile and Peru compete with each other in the sale of that substance, the proportion and conditions to which each one of them must submit in the sale of that fertilizer shall be previously decided by both governments."

Articles 9 and 10 of the treaty established besides that the Lobos Islands should continue to be administered by the Government of Chile until the termination of the exploitation of the million tons to which the fourth article referred, Chile binding itself to deliver to Peru the fifty per cent which corresponded to its share in the guano of those islands.

Article 6 established the monstrous rule that the creditors of Peru ought to submit, in the proof of their claims and other proceedings, to the rules fixed in the supreme decree of February 9, 1882.

To sum up, Chile appropriated fifty per cent of the Peruvian guano and assumed the right of sub-

jecting the Peruvian creditors to the rules established by itself and, finally, limited Peru's rights to exploit that riches in the future.

It was well known at that time that the guano could not be a considerable source of revenue and that, consequently, those provisions as to guano which involved such a monstrous restriction on Peru's sovereignty and an unjustified subjection of the latter's creditors to Chile's prescriptions would have no very considerable importance.

The saltpetre had replaced guano as a fount of fiscal resources. As to this product, the treaty of Ancon contained the following stipulation which we copy literally:

> "Article 8. Outside of the declarations contained in the preceding articles and of the obligations which the Government of Chile has accepted in the supreme decree of March 28, 1882, which regulated the saltpetre property of Tarapaca, the said Government of Chile does not recognize credits of any kind which may affect the new territories which it acquires by the present treaty whatever be their nature and source."

The simple comparison of the declarations which Chile made in the year 1881 concerning the recognition of all the mortgage incumbrances constituted by the Government of Peru with those of Article 8 in which it is stated that Chile does not recognize credits of any kind affecting the new territories whatever be their nature and source, suffices to understand the contradiction that Chile incurred, vio-

lating its pledged word and breaking the incontravertible rules of international law.

Let us remember the principles of international law applicable to this case. All the authors accept the rule "Res transit cum suo onere." Phillipson says, in his aforementioned work, at page 322, that the application of this rule has been found convenient in practice and recommends itself to the juridical consciousness of humanity.

Ceded territories are subject to public debts of both local and general character.

No one has established the rules on this point better than Merignac. They are the following:

> "The annexing State must pay: First, the debts which have been contracted exclusively in the interest of the annexed province as for instance, all the expenses of local interest. Second, the mortgage debts secured by real property in the annexed province. In this case the real right of mortgage permits the pursuit of the property subject to the mortgage, as among private parties, whosoever's hands it be in. Third, the civil and military or retirement pensions to those who have accepted the annexing country's nationality. Fourth, the particular credits resulting from the expenses of public interest made in the annexed provinces."—Traite de Droit International, 1907, p. 496.

In view of these principles, what happened after the approval of the treaty of Ancon by the apocryphal assembly of 1884 was logical. The representatives of all the powers the subjects of which were creditors of Peru presented their protest against the

treaty in the most energetical manner. It was surprising that those protests were not followed by the pursuit of the mortgaged thing which Chile held, which pursuit international law recognized in accordance with the second rule which we have transcribed. In any event, the fact of these protests and the terms in which they were conceived affirm our criterion concerning the monstrosity embodied in the eighth stipulation of the treaty of Ancon.

Chile was lucky enough to deviate the action to which the creditors of Peru were so clearly entitled. This country, after suffering the horrors of a war which in its later stages had been prolonged to avoid a new territorial mutilation and to secure the subsistence of the guaranty in favor of the creditors, had to assume, being exhausted and its entire economic life almost destroyed, the overwhelming weight of its foreign debt.

Years later, the Government of Peru, in order to honor the obligations which its debts involved, found it necessary to deliver its whole railroad net and the means of communication with Bolivia on Lake Titicaca to the Peruvian Corporation. Chile limited itself to giving to the Peruvian creditors fifty per cent of the guano and afterwards to recognize in their favor eighty per cent of the other half which it had reserved to itself. The war meant for Peru, in its liquidation, not only the loss of territory and of the only source of fiscal wealth but the delivery of its means of communication to a foreign company with all its inconveniences from the economic point of view and with its lamentable consequences against the national sovereignty.

Chapter V.

Chile's Purpose of Not Establishing Definitive Peace on Opening a New Problem.

In spite of the unprecedented harshness of the treaty which Chile imposed, the treaty would have had the advantage of establishing peace if it had liquidated all the problems of the war. But the Government of Chile was not satisfied with wresting from Peru its riches, mutilating its territory, subduing part of its population, causing it the loss of its railroad net, but wished to throw on it the anxieties of a new problem by leaving a question open. Aldunate, quoted by Bulnes, says:

> "It is very notorious that from the time of Pierola's fall the different leaders who have succeeded each other in the Government of Peru, representing the spirit of resistance to peace, have manifested themselves disposed to sign it provided that Chile should limit its exigencies to the cession of the province of Tarapaca up to Camarones. So that the most desperate and most disastrous period which Peru has sustained against the Chilean armies of occupation is precisely that during which all the causes of our conflicts were limited to the vanquished country's resistance to ceding to Chile the territories of Tacna and Arica."—Bulnes, "La Soberania de Tacna y Arica." Extractos del Libro de Bulnes, p. 55.

After this obvious confession, Peru having consented, as we have stated in the next preceding article, to permit that Tarapaca should pass to Chile without debts and without mortgages, it is aston-

ishing to note Chile's exigency of continuing to occupy the Peruvian territories and of availing itself of them as a source of a second pecuniary indemnity or as a means of hitching Bolivia to Chile's wagon or, finally, as the instrument of a new territorial conquest.

Within the Chilean point of view itself, Chile ought to have been satisfied with the unencumbered riches of Tarapaca and, in the worst of cases, with the occupation of Tacna and Arica, without exacting the ransom of the ten million and without imposing the plebiscitary procedure which, from the first moment, it prepared itself to employ as a means of aggravating the condition of the vanquished.

Chile did not proceed unconsciously in leaving a question open in the treaty of peace.

At the moment when the treaty was signed, the provinces of Tacna and Arica did not represent an immediate and direct interest for Chilean sovereignty. The negotiator of the treaty, Mr. Novoa, had the thought that those provinces should return to Peru. He gave it to understand in his letter to Mr. Castro Saldivar, and he affirmed it in a categorical manner to Mr. Larrabure y Unanue, First Assistant Secretary of State at the time of making of the treaty. He also so stated to Balmaceda, in March, 1882. The following are Mr. Novoa's words:

> "I prefer that they pay us the twenty million and take that territory with Arica unfortified to having necessity draw us into keeping the port and Tacna."—Bulnes, "La Soberania de Tacna y Arica." Extractos del Libro de Bulnes, p. 15.

Mr. Novoa saw in Tacna and Arica the means of securing for Chile, if not the twenty million of which he spoke in his letter to Balmaceda, the ten million which the treaty established. This thought was also that of Mr. Aldunate who considered the formula of the plebiscite as a means of securing an indemnity without running into the objection which the American Chancellery had made to the stipulation of a ransom for Tacna and Arica which would be adding a pecuniary indemnity to the territorial indemnity of Tarapaca. But the thought of Mr. Santa Maria, the President of Chile, was very different. It is by it that the opprobious character of the treaty must be judged. Mr. Santa Maria thought of creating an undefined situation and of postponing the solution of the problem of Tacna and Arica until the moment which should be most favorable to Chile.

For that reason, the protocol regulating the plebiscite was not incorporated in the pact, a protocol which, had it been made, would have resulted, through its fulfillment within ten years, in the reincorporation of Tacna and Arica in Peru.

The guilty Chilean intention in not subscribing the protocol immediately is evident. The third article of the treaty said:

> "A special protocol which will be considered as an integrating part of this treaty will establish the form in which the plebiscite must take place, and the terms and periods within which the ten million must be paid by the country that remain the owner of Tacna and Arica."

The said protocol ought to have been entered into immediately since it was an integrating part of the

treaty. Not to enter into it was to begin to violate the treaty itself and to commit an offense against its very integrity.

Why was not that protocol entered into? The historian, Mr. Bulnes, is going to reveal to us the historical truth:

> "Novoa wished to make the protocol immediately, to cover the last crack that remained in the wall, so that the treaty should be approved together with the protocol and that everything should be terminated at the same time. To this end, he consulted Santa Maria, asking him for authority to take up and decide the difficulties which have arisen afterwards. Santa Maria answered him to leave that alone until its opportune moment, when the treaty should have been approved by the Congresses. He added that the formulation of that protocol was a governmental function, regulatory of the treaty, and that to try to agree upon something destined to be carried out ten years afterwards was to expose one's self to repent later of that done. Santa Maria attached little value to the protocol. He considered it secondary or regulatory."

Novoa to Santa Maria, October 27, 1883:

> "As a complement to the treaty, it is necessary to make the protocol to regulate the plebiscite relative to Tacna and Arica, and I would like to have you and Mr. Aldunate give me your ideas in this respect.
>
> "Who will have the right of suffrage? Shall it be universal or must certain conditions be exacted of the voter? The election boards: shall they be appointed by the political authority designating at its own will the persons to

compose them, or shall these be elected from among those who pay the greater amount of taxes? Of what nationality must their members be? Will any Peruvian authority intervene? I hope, then, that you give me your ideas on this point as soon as possible."

Santa Maria answered him first by this telegram:

"November 9, 1883: The point consulted upon is delicate. I see no urgency for taking it up. It is bound to various events. It may be necessary to abandon tomorrow any order of ideas that may be established. Haste may bring us peril. We must await at least the ratification of the treaty. There is no time for writing by steamer."

Santa Maria to Novoa, November 14, 1883:

"Have you believed that this point can be taken up now? Not only would it be imprudent but unnecessary because it is clear that the case of the declaration would not arrive if events should develop as they appear today. But be the determination of the bases what it may, it has two very serious difficulties: First, that they cannot be fixed as long as the treaty be not a treaty because there would be something ridiculous in making efforts to enhance an act which it is not yet known whether or not it will have true existence. The bases or agreements for the election would be consecrated in one or two subsequent protocols as a consequence of the stipulations of the treaty, and these protocols are not up to the congresses but up to the respective governments only which tend to establish the means of sincerely performing a pact. We cannot anticipate; and secondly if we should now fix the bases it might well happen

that they should prove either impossible or the source of odious reclamations later. One cannot calculate with so much certainty regarding acts which are to be performed ten years hence, and in which the inhabitants of a community must intervene since the matter concerns them for the future. We would perhaps endanger success by anticipated agreements which may be the cause of repentance for one or the other of the contracting parties."

To this letter Novoa answered:

"To Santa Maria, November 30, 1883:

"Protocol: In my letter of October 27 I asked you for instructions for the Tacna and Arica plebiscite as much because, on expressing in the third article of the treaty that the protocol would be considered as an integrating part of it, it seemed to me that on discussing the treaty the protocol should also be approved, as because, on stating the terms of the third stipulation, Mr. Aldunate himself told me that said protocol would be made opportunely and prior to the meeting of the assembly so that both things might be considered at the same time. In other respects, the Peruvian government has not insinuated anything regarding this matter to me, but foreseeing that it might be asked of me that we should take up this matter, I wished to have the corresponding instructions ahead of time. So that since your opinion is that this must not be thought of for the present, there is nothing further to say on the subject."—Bulnes, "La Soberania de Tacna y Arica." Extractos del Libro de Bulnes, p. 43.

Nothing is more eloquent than the document which we have just transcribed. In order that the treaty of Ancon should have been a definitive peace

agreement, it was indispensable, according to the very text of the second paragraph of the third clause and according to the thoughts of the negotiators Aldunate and Novoa, that the protocol regulating the plebiscite should have been subscribed.

Without the protocol, the agreement could not meet the nature of the peace because it did not lead to the definitive liquidation of the war and, much to the contrary, opened up the very grave problem which had resulted in the continuation of hostilities after the cession of Tarapaca had been agreed upon.

Bulnes says:

> "But this being true it cannot be denied that Novoa's foresight was a look into the future and that this protocol would have obviated the difficulties which present themselves today for the definitive solution of the most complicated problem which the war of the Pacific originated."—Bulnes, "La Soberania de Tacna y Arica." Extractos del Libro de Bulnes, p. 45.

The treaty of peace should not have originated any problem but ought to have solved the existing ones.

The non-subscription of the protocol meant practically that Chile reserved to itself the exercise of its pressure on Peru in the problem of Tacna and Arica, that is, to continue the war by means that should not be military and under the form of peace.

The postponement of the protocol in 1884 had to be followed logically by the indefinite postponement at the termination of the ten years because Chile followed Santa Maria's policy of not binding

itself by anticipated agreements and of seeking the most favorable moment.

The treaty of Ancon being studied from the point of view which we have contemplated in this chapter, it must be agreed that it was not an instrument of peace but, on the contrary, an element of discord and a source of interminable discussions and controversies in which the victor was to pretend to superimpose itself upon the vanquished subjecting it to its criterion and to its aspirations. This fact gives an unmistakable physiognomy to the treaty of Ancon and radically differentiates it from others.

Of course we are not going to take into account the ridiculous Chilean theory which compares the treaty of Ancon to the pacts which establish a previous cession referring their ratification to a subsequent plebiscite. To affirm that the treaty of Ancon was a dissimulated formula for establishing the annexation of Tacna and Arica on the basis of a subsequent plebiscite is such an absurdity that it is hardly worthy of refutation.

The theory of the dissimulated cession exposed by Chile for the first time in a circular of 1901 and repeated in the Red Book and Bulnes' last publications has only this value and significance: It has given us the proof, presented by Chile itself, that Chile was never disposed to honestly fulfill this treaty nor to hold the plebiscite under conditions of justice.

Let us not, therefore, insist on the comparison of the decisive plebiscite established by the treaty of Ancon with the plebiscites confirmatory of previous cession such as those of Nice, Savoy and St. Bartholo-

mew Island. The plebiscite was simply a condition which, within a fixed period, was to determine one of these two things: either the continuation of Peruvian sovereignty in the territories of Tacna and Arica or the extinction of that sovereignty in the improbable, or rather impossible, case of a vote favorable to Chile.

The plebiscite came to be the means of deciding the question which, besides the cession of Tarapaca, was the other grave essential question of the war for which Peru, according to Mr. Aldunate's concession already transcribed, had continued the resistance two years more without resources and without hopes. The non-regulation of the plebiscite at the opportune moment meant that peace had not really been made. In this sense the treaty of Ancon was not a true treaty of peace but an instrument of oppression.

The pact was not a perfect document: it lacked integrity and did not answer the essential end of every treaty of peace, which is peace and the liquidation of the war.

Chapter VI.

The Treaty of Ancon was a Unilateral Imposition and an Instrument of Oppression.

We have proved in the foregoing chapters that the treaty of Ancon had incurable vices of origin: First, because it was signed by an illegitimate government and ratified by an assembly in which the Peruvian departments or provinces not occupied by the enemy were not represented; second, because it embodied the consecration of an unjustifiable conquest of territories foreign to the object of the struggle and essential for the economic and political life of the vanquished country against the expressed will of their inhabitants; third, because it imposed an immoral and absurdly exorbitant war indemnity; fourth, because it violated the indisputable principle of respecting the mortgage incumbrances which weighed upon the ceded territories; and, fifth, because, without liquidating the problems of the war, it opened up a new problem which was to permit the victor to continue its policy of hostility and oppression against the vanquished.

In spite of the declarations of some practical jurisconsults who, for reasons of convenience, accept the absolute inviolability of pacts, whatever be their immorality and their injustice, the tendency predominates in the modern international law to affirm the invalidity of international agreements when they clearly offend the principles of reason and the laws of the lives of peoples.

Heffter already said that a State can repudiate a treaty when it is in conflict with the rights and the

well-being of its people. Hauteville affirmed that treaties which contain gratuitous cessions or abandonment of essential natural rights are not obligatory. Bluntschli thought that a State can maintain that the treaties incompatible with its development are null. Fiore, summarizing this overwhelming current in international law, considers that treaties opposed to the development of the free activity of a nation and which obstruct the exercise of its natural rights are worthless, and finds, in the light of this principle, that numerous treaties made in Europe seem to be immoral, iniquitous and entirely lacking in value. The foregoing principles have a perfect application to the treaty of Ancon. We have proved that the consequences of the treaty on the territorial integrity and on the economic future of Peru meant practically the annulment of this nationality. And the problem which was left without decision when the protocol complementary to the treaty was not signed resulted in the most serious obstacle to the moral and economic restoration of the vanquished country.

A treaty of peace, according to the principles of international law, must embody a compromise. Beside the rights of the victor, the essential rights of the vanquished must be left unimpaired.

Nys says:

> "In the middle of the eighteenth century, Wolf taught that war carries with it a compromise. The precise idea which we must form of a treaty of peace, says William de Garden, is that it has for its subject not only to put an

end to war but to prevent its return. The treaty of peace cannot be but a compromise. If an exact and vigorous justice is not observed there and each one of the parties is permitted to pretend to receive what does not belong to it, peace shall rarely be possible. Since, writes the same author, it is shameful to perpetuate war and to carry it on to the point of the ruin of one of the parties, and since in the justest case one must think of re-establishing peace and of tending ceaselessly to this salutary end, there is no course left other than to compromise on all the pretensions, on all the damages, of one party respecting the other, and to extinguish the differences by means of the most equitable agreement possible. One does not here pass upon the very causes of the war nor upon the controversies that the various acts of hostility could excite; none of the parties is condemned as unjust nor could any one tolerate it; but that which each one ought to have in order to renounce its pretensions is agreed upon."—Nys, "Droit International," pp. 746-747.

No one can doubt that the treaty of Ancon was not destined to end the war but to perpetuate it and to carry it to the point of ruin of one of the parties, following William de Garden's expression.

Modern authors think as did Wolf and de Garden. Phillipson, in his aforementioned work at pp. 165 and 166, says:

"It follows from the above observations that a treaty of peace is of necessity a compromise, being unlike other treaties which are equal transactions—that is, those in which the consideration given by one party, A, for the promise of the other, B, is equal, or presumed to be

equal, to the consideration given by B for the promise of A. But a treaty of peace is, as it has been aptly termed, a 'contract of fortune,' —for one of the parties, if not for both, it may indeed be a contract of misfortune. It is inevitably a patched up arrangement, providing for each side a roughly approximate solution of the differences between them. Where terms are dictated throughout to the utterly vanquished belligerent at the absolute discretion of the victor, the transaction cannot, strictly speaking, be designated a treaty; it is a unilateral imposition of demands. Every treaty of peace proper must have a bilateral character; it must involve reciprocal concessions, however unequal they may be. Even in earlier ages, when the *jus victoriae* was recognized and was in certain respects more cruel than the *jus belli,* we find such restrictions placed on the victorious combatant as to make his dealings with the defeated State a compromise. The object of the treaty of peace is not merely to put a stop to a war, but also to prevent its renewal; and this latter purpose is accomplished by means of a bargain settling each side's claims and pretensions. It is not an impartial judge who effects this accommodation; it is the disputants themselves who do so, and in general they are unequally matched, so that less than justice can be done. To give each one his due is the ideal of human relationships; but in a treaty of peace much less than in man's other devices and contrivances shall we find this object attained." (Citing Vattel): * * * "Therefore, since it would be dreadful to perpetuate the war or to pursue it to the utter ruin of one of the parties, and since, however just the cause in which we are engaged, we must at length turn our

thoughts towards the restoration of peace, and ought to direct all our measures to the attainment of that salutary object, no other expedient remains than that of coming to a compromise respecting all claims and grievances on both sides, and putting an end to all disputes by a convention as fair and equitable as circumstances will admit of."

These principles were relegated to complete oblivion by the Chilean negotiators. The treaty of Ancon embodied, with the cession of Tarapaca free of debts and the occupation of Tacna and Arica as means of obtaining a supplementary war indemnity, the maximum of Chile's pretensions presented at the Arica conference and in the protocol of Vina del Mar. The plebiscitary formula which Messrs. Novoa and Aldunate accepted aggravated that intention of pecuniary indemnity embodying it in the plebiscitary clause which not being defined had to renew perpetually the sentiments of hostility and discord which the war created.

The treaty of Ancon was not, therefore, a true peace agreement. The only thing that Peru was able to save was the continuation of its sovereignty in Tacna and Arica and the right of their inhabitants to retain their nationality. But even regarding this very right, Chile, as we have recalled, reserved the means of abusing it by postponing the protocol concerning the rules of the plebiscite which ought to consecrate it.

In spite of the unilateral imposition character of the treaty and of its unqualifiable injustice, Peru

could not but have these rights: first, the right to peace, to an equitable and reasonable treatment and to a conduct on the part of Chile, if not impartial, at least correct; second, the right to have the stipulations of the monstrous pact which had been imposed upon it fulfilled in their spirit and in their letter.

And Chile has not respected those rights and has violated the very pact which consecrated its extreme aspirations.

Chapter VII.

Chile Violates the Very Treaty Which It Imposed.

In the introduction to my book, "Our Question with Chile," I have proved that the treaty of Ancon ought to be held to be definitively broken. In this chapter, I must insist on those arguments in the light of the principles consecrated by international law.

No one has dealt with the point relative to the breach of the treaty of peace better than Vattel; the modern authors do nothing but reproduce this rule without going any further, either in form or in substance, with respect to the truths formulated by the famous master.

It is curious to note that Vattel when he speaks of the breach of the peace points out precisely all the cases of violations committed by Chile. One would say that the writer of the eighteenth century had the intuition of a genius concerning the typical case of breach of the peace which was to occur in the nineteenth century. Vattel studied all the forms in which peace can be violated. As time went on, an example was to present itself which should comprise all the violations which had appeared separately in the diplomatic history of the world. Vattel says:

> "To break a treaty of peace is to violate the agreement which it contains doing that which it forbids or not doing that which it prescribes. One may fail to fulfill the obligations arising from a treaty in three different manners: by conduct contrary to the nature and to the es-

sence of the treaty of peace in general, by acts incompatible with the nature of the particular treaty or, finally, by violating some one of its express articles."—Droit de Gens, 1820, p. 744.

The three foregoing principles appear accepted by the modern authors. (See Halleck's International Law, Vol. 1, p. 347, and First Steps in International Law by Sir Sherston Baker, Bart.—1899, p. 116.)

Vattel explains in detail each one of the three cases of violation of the treaty of peace. Regarding the first he says:

> "One acts against the nature and essence of any treaty of peace or against peace itself when one disturbs it without cause either by taking up arms and renewing the war although one be not able to allege even a possible pretext, or by offending the mental comfort of the party with which the peace has been made and treating it or its subjects in a manner incompatible with the state of peace and which it be not able to suffer without failing in its self respect."

Vattel considers that the peace is constituted by respect to the nation with which it has been made and by good treatment accorded its subjects.

All America knows why Peru has not ceased to cause its protests against each one of Chile's offenses to reach the countries of the continent, but Chile has continued to carry on a policy of hostility and contempt regarding the rights of Peru and of oppression of Peruvian subjects in the territories occupied or conquered. The shameful conduct of Mr. Lira in exacting unusual guaranties for the pay-

ment of the indemnity and offending Peru with opinions concerning its solvency was contrary to the nature of peace. That burlesque postponement of the Billinghurst-Latorre protocol in the Chilean Chamber of Deputies during three years was contrary to the respect to which Peru was entitled. The projected agreement of 1895 which ceded to Bolivia the Peruvian territories of Tacna and Arica was contrary to the essence of peace and to the elementary principles of loyalty between the two countries. Finally, the attitude of Chile on not giving satisfaction for any of the outrages consummated by its authorities and its maintaining cynically its policy of violence in the captive provinces, in the midst of the astonishment of the other countries of America, has been contrary to that just treatment of which Vattel speaks.

Vattel has studied specially the treatment given to the subjects of the other country, and which the latter cannot tolerate without failing in its self-respect. The illustrious writer has considered this point several times; he again calls attention to it in the second case of violation, and that indicates that he considers that the maltreatment of the subjects of the country with which peace has been made violates not only peace in general but the spirit and the essence of the treaty in particular.

That Chile has committed this violation is hardly worth while proving when the outrages committed by it have acquired continental notoriety. I refer only to the essential proofs which I published in my book, "Documentos Esenciales del Debate Peruano-

Chileno," Chapters 16 and 17, Documents 56-59 and 64-66.

Vattel continues:

> "The second way of breaking a treaty of peace is to do something contrary to that which the particular nature of the treaty requires. Thus every act contrary to friendship breaks the treaty of peace made under the express condition of living always as good friends. To favor the enemies of a nation, to threaten its citizens harshly, to molest its commerce without cause, to prefer another nation . . .; to protect its conspirators or rebels, to give them asylum; all these acts are equally contrary to friendship."—Droit de Gens, p. 751.

The most interesting part of this second point is that which refers to favoring the enemies of the nation with which peace has been made. The Chilean policy, immediately after the ratification of the treaty of Ancon, was to encourage the countries which were Peru's boundary neighbors in their frontier pretensions, creating practically a formidable diplomatic entente under the pressure and unbreathable atmosphere of which we have lived in later years. The project of delivering Tacna and Arica to Bolivia, manifested since the year 1884 and embodied in the absurd pact of 1895, had no purpose other than to create a permanent situation of discord and hostility between Peru and Bolivia. Whenever that situation of lack of harmony between the two countries went through an acute period, it was the Chilean influence and moral support which kept the relations strained and placed things on the border of a break.

Peru decided to settle the boundary question with Bolivia by means of arbitration. When the decision which salomonically divided the territory between both countries was handed down, Chile inspired Bolivia with the idea of not abiding by the decision and upheld its policy in this respect. (See Document 71 of my book, "Documentos Esenciales del Debate Peruano-Chileno," and the other telegrams published by "El Comercio," of Lima in 1909.)

Peru was twice on the verge of having war with Ecuador and both times due to Chilean influence.

Chile's action regarding Ecuador and Colombia against Peru has had not only indirect and dissimulated manifestations but express and solemn ones. The protocol of January 17, 1902, stipulated the sale by Chile to Colombia of an armored ship with ammunition, provisions and other necessary elements. In the agreement of January 18th annexed to that protocol, the tripartite arbitration agreement signed in Lima in 1894 by the plenipotentiaries of Colombia, Ecuador and Peru was conspired against, and an agreement was made to render impossible, after the failure of the tripartite arbitration, the other arbitral agreement of 1887 between Ecuador and Peru. Finally, when in spite of those agreements the Spanish arbitration was proceeded with and the decision was about to be handed down, the Chilean Government incited Ecuador to reveal itself against the projected decision. That Ecuatorian attitude coincided with the arrival in Guayaquil of a Chilean ship which carried armaments.

In conclusion, Chile has incurred in the second violation of the treaty of peace not only by favoring the enemies of Peru but inspiring the policy of those countries and supporting it morally and materially.

Vattel adds:

> "Finally peace is broken by the violation of some of the express articles of the treaty. This third manner of breaking it is the most decided and the least susceptible of evasions and chicanery. The party that fails to fulfill its obligations annuls the treaty in so far as it is concerned. As to this there is no doubt."

While it is true that as regards the violations previously considered there is room for moral judgment and appreciation in general terms only, the cause of breach considered in the third place by Vattel has a character of precision which he himself has set off on saying that there is no room for evasions and chicanery.

The treaty of Ancon established the occupation of the provinces of Tacna and Arica by Chile, employing express terms on this point. First, boundaries of the occupation. Second, character of the occupation, that is, rights of Chile. Third, regime of the occupation, that is, rights of Peruvians. Fourth, period of the occupation.

Respecting the boundaries it says: "It is bounded on the North by the River Sama from its source in the Bolivian frontier cordilleras to its outlet to the sea."

Respecting the character of the occupation it says that the territory will continue to be possessed by

Chile, that is, it affirms only the continuation of the precarious military occupation in the form of simple possession.

Respecting the regime it says that the territory shall be subject to the Chilean legislation and authorities.

Respecting the period it says: "During the period of ten years from the time of ratification of this treaty."

Repeating the character of the Chilean possession and the regime of the occupation it adds, on speaking of the plebiscite, that it shall be decided by popular vote whether the territory of the said provinces becomes definitively of Chilean ownership and sovereignty or continues to be part of the Peruvian territory.

Chile has violated the first stipulation regarding the boundary. The River Sama is formed by the affluence of the Estique, the Ticalaco and the Chaspaya.

This is a geographical question as to which there is no room for dissertations, but verification of a material nature, that the principal branch of the Sama, not only because of the greater volume of its waters, but also because of the direction of the current, is the Estique. Although it knew the foregoing, the Chilean Government and authorities proceeded to occupy the Peruvian districts of Tarata, Tarucache and Estique. There is something more, past the Barroso cordillera in which the River Sama has its source, in the midst of the high plateau region, lie the Peruvian territories of Maure and Cano be-

longing to the Province of Tarata. This territory is foreign to all discussion concerning the origin of the Sama and belonged always to Tarata and not to Tacna. Notwithstanding the foregoing, Chile slowly and surreptitiously has extended its occupation to that territory to which the third article which speaks solely of the provinces of Tacna and Arica in no way referred.

It is not the case of a question open to discussion but the case of a clear question subject to an inspection by experts only. Chile ought to have accepted that inspection or any other means of settlement, such as arbitration, for instance, if it had wished to fulfill the treaty. But as it had decided to violate it, far from solving the problem, if the question to which that excess space gave rise may be so called, it closed itself to all agreement and continued to occupy the territories unlawfully held and to advance that occupation.

Chile has violated, in the second place, the express stipulation relative to the simple possession conferred upon it by the treaty. Nothing is clearer in international law than the distinction between possession and sovereignty or ownership; that distinction corresponds to the one that the civil law establishes between possession and ownership. That the treaty did not grant Chile full sovereignty is evident. Sovereignty subject to termination on the lapse of a period is never conceivable.

The Chilean theory which affirms that since Chile could exercise the rights of jurisdiction and legislation it had the right of sovereignty is unfounded.

Sovereignty comprises, besides legislation and jurisdiction, the concept of permanency and of definitive ownership. The treaty, not only once but several times, has set off the precarious possession which it gave Chile. As we have already said, the words "shall continue to be possessed by Chile," mean simply the continuation of the possession which Chile enjoyed as a result of the military occupation. Besides, the treaty has clearly differentiated the juridical conditions of Tacna and Arica: the one which was theirs according to the treaty and that which they would be in in case of a plebiscite favorable to Chile. The former is of possession, the latter of sovereignty and ownership.

Let us hear the Chilean authorities on this matter.

Suarez Mujica says:

> "It must be borne in mind that the Peruvian sovereignty in Tacna and Arica is suspended but not extinguished."

Carlos Walker Martinez says:

> "It must not be forgotten that in Tacna and Arica the possession is Chile's but the sovereignty is Peru's."

This being established, let us examine the attributes which Chile has usurped or, rather, which Chile has exercised in the territories of temporary possession. Let us simply recall the following:

First, Chile has organized these territories within their permanent political boundaries creating new organisms different from those which existed within the former constitution of the provinces.

Second, it has established in an arbitrary manner the boundaries between Arica and Pisagua, including

within the latter the borax deposits of Chilcaya which unquestionably belonged to Arica. Territorial demarcations do not require the simple exercise of temporary legislation and jurisdiction but the more ample one of sovereignty.

Third, Chile, by the treaty of 1904, has fixed the eastern boundaries of Tacna and Arica with Bolivia, ignoring Peru. International boundary questions can be settled by the owner and sovereign of the territory only.

Fourth, Chile has contracted for the construction of a railroad which involves permanent responsibilities and encumbrances with respect to the territory, without consulting, and without the acquiescence of, the true sovereign which, according to the treaty of Ancon, was Peru, and the rights of sovereignty of which were only in abeyance during the temporary occupation.

It is not necessary for us to give more facts. The confession of the party suffices. Chile, in order to explain the measures which it has taken with respect to Tacna and Arica has had to invent the theory of sovereignty for a term and to affirm that the treaty of Ancon involved the dissimulated cession of Tacna and Arica.

Chile has also violated the express stipulation which says that the territory shall be subject to the Chilean legislation and authorities.

The Peruvian negotiators of the treaty of Ancon could not accept the occupation of Tacna and Arica leaving their regime to the will of Chile. That would have been not only stupid but a crime against international law. Those negotiators exacted for

Tacna and Arica, that is, for the inhabitants of those regions, the rights and guarantees which the Chilean constitution and laws granted to the inhabitants of Chile. It was not possible that to the misfortune of occupation by another country should be added that of the individual rights of those inhabitants being at the mercy of the occupant.

On this point, as on the others, there is no room for discussion in the face of the explicit terms of the treaty.

Well, then, Chilean legislation confers on all the inhabitants of Chilean territory the rights known by the name of individual guarantees, that is, individual liberty, inviolability of the home, freedom of religion, of thought, of the press, of teaching, and of work, the right of property and, finally, the right of being judged by the laws and by the tribunals which those laws recognize.

From the moment when Chile decided to undertake the policy called the policy of chilenization, all these rights have been violated.

It was begun by closing the Peruvian schools and by refusing permission to open new schools. (See Documentos Esenciales del Debate Peruano-Chileno, Ds. 56 and 57.)

Owing to this, the Attorney General of Chile confessed categorically that those schools could not be closed and that the opening of new ones could not be prohibited under the constitution of Chile, but that the Government might do both those things under the martial law which it had the right of imposing on the occupied provinces.

That means, then, that, in accordance with the highest official juridical criterion in Chile, the regime which the Government was to apply to those provinces was that of martial law and not that of its ordinary legislation. We abide by the complete proof which the Attorney General of Chile furnishes us with.

After the closing of the schools, offenses were committed against the Peruvian societies by trespassing into their establishments and destroying them. At the same time, the printing establishments of the Peruvian newspapers were wrecked. The rights of association and freedom of thought were thus suppressed.

Then came the closing of the churches and the expulsion of the Peruvian priests, a double offense against the right of freedom of cult and against the right of security.

The priests who were notified of the expulsion presented a habeas corpus petition to the Court of Tacna, upon which petition the Court could not but act favorably. The expulsion was accomplished in flagrant violation of the decision of the tribunal. As in the case of the schools, we submit as proof of what we affirm the decision of the Court of Tacna. At the same time, the workmen were being expelled from the shore, pressure was being exerted on the commercial houses to dismiss the Peruvian employees and a barbarous law of expropriation was being prepared destined to wrest the real property from the hands of its legitimate owners, compelling them to emigrate. Those measures involved the extinction

of the rights of work and of property. Crowning all this, the expulsion en masse of the Peruvians was accomplished and the other outrages stated in detail in Document 66 of our aforementioned book, "Documentos Esenciales del Debate Peruano-Chileno," were committed.

The breaking off of relations decided upon by the Government of Peru in the following words: "The Government in the face of such a situation considers it useless to maintain its representatives in this capital," was a consequence of all this. (Document 59, Documentos Esenciales del Debate Peruano-Chileno).

Chile, finally, has violated the express stipulation as to the period of occupation.

It is not true that, as Chilean writers affirm, the period of ten years was fixed principally for the plebiscite and secondarily for the occupation and that the condition to put an end to the latter was the holding of the plebiscite.

It suffices to read the third clause to convince one's self of the cunning and chicanery of this line of argument. The treaty says, "the territory shall continue to be possessed . . . during the period of ten years counted from the time of ratification of this treaty of peace." There is nothing more categorical and absolute than this clause.

Pursuant to the principles of law, the lapse of the period results in the cessation of the juridical situation for which that period has been established. The expiration of the period of ten years ought to

have resulted automatically in the evacuation of the territories of Tacna and Arica.

To suppose that the plebiscite contemplated in that article, in a paragraph other than that in which the period of time is spoken of, was the condition upon which the termination of the occupation depended, is not only illogical and antigrammatical but would have involved the injustice of leaving the duration of the occupation at the mercy of the will of Chile for holding the plebiscite.

The period is an absolute concept as is every mathematical concept. It is never possible to say that something the continuation of which is subject to a term may exceed that term by reason of some other fact. In that case the dissolving condition is no longer the term but that fact and that is neither the letter nor was it the spirit of the treaty of peace.

Chile, far from evacuating the territory and delivering it to its legitimate owners or from accepting, in the worst of cases, a mixed administration, transformed the simple possession into the ample exercise of the rights of sovereignty and systematically eluded the plebiscite.

But this takes us to a new and more interesting violation of the treaty contemplated also by the subtle and profound intelligence of Vattel.

This author said:

> "Pretended delays are the equivalent of an express refusal (he refers to the fulfillment of the treaty of peace) and they do not differ from it but by the artifice with which the party that employs them would wish to cover its bad faith. It adds fraud to perfidy and really violates the

article which ought to be complied with."—Droit de Gens, p. 752.

This is precisely the case of Chile regarding Peru. Alleging pretexts, it has delayed the holding of the plebiscite, adding fraud to perfidy.

An agreement as to the holding of the plebiscite was reached twice: in the protocol of the year 1894 and in the treaty of arbitration of 1898. The former, entered into with the approval of the Chilean Government, was later disapproved without any explanation; and the latter approved by Peru and by the Chilean Senate was delayed in the Chamber of Deputies during three years in spite of the Peruvian efforts to the end that this body should pass upon it. Finally, that Chamber returned the treaty to the Executive, forgetting the formidable admonition of the illustrious Chilean orator, Carlos Walker Martinez, that such an attitude was repugnant to the moral interests and to the prestige of Chile.

Peru since the year 1892 offered the most ample and conciliatory bases for the holding of the plebiscite (see Documents 48-55 of my aforementioned book, "Documentos Esenciales del Debate Peruano-Chileno").

All the missions which Peru has accredited before Chile have had but one object: to obtain the plebiscite on bases of justice and of truth.

None of them showed a spirit of intransigency; they simply proposed elementary conditions concerning the plebiscite: truth, neutral supervision, vote of the natives, and arbitration for all questions that it might not be possible to settle directly. Peru even

accepted that the Chileans with the residence which the Chilean law requires for the establishment of domicile should vote. It is not necessary that we accumulate proofs in this respect. We have something which is worth more than all that: the declarations of Chilean notables. The following paragraph from Bulnes has been cited to satiation but it shall never be impertinent to quote it:

> "Peru has been listening to the clamour of the inhabitants of those provinces to incorporate themselves in their former nationality and by patriotism and even by decorum it could not manifest itself unfeeling to this pretension. Peru has had blind confidence in the plebiscite."

The Chilean Senator Ross confirms what Bulnes says:

> "The ten year period for holding the stipulated plebiscite ended in 1893, twenty-five years ago, and this act has not been performed.
>
> "Why? We can consciously affirm that it has not been performed because Chile has obstructed opposing all kinds of difficulties and dilatory measures."

Those difficulties arose from various plans, all of them contrary to the spirit of the treaty, which Chile entertained regarding Tacna and Arica. It thought at one time of keeping those territories and it did not hesitate to seek the collaboration of the English or French creditors of Peru. It offered the former the ten million. Later it secretly agreed with Mr. Bacourt, France's representative, upon the delivery of the ten million ransom to the end of causing the influence of the French creditors and of the Govern-

ment of France to be exerted in favor of the retention of those territories. Later, reviving the projects of Mr. Santa Maria, it thought of delivering those territories to Bolivia. Then it mocked Bolivia and decided to accomplish the conquest in the midst of peace and then came martial law and the diplomatic pressure exerted on Peru through the neighboring countries: in one word, the continuation of the war without military hostilities.

The treaty of Ancon from its origin was not an instrument of peace; its character of an instrument of oppression and violence appears more clearly in the manner in which Chile executed it.

Chile has renewed the war or, rather, continued it. The consequences which Vattel, and with him all the authors, foresaw, when the peace is not just and does not respect the rights of the vanquished, have happened literally.

We would like to touch here upon the violations of international law committed by Chile against Peruvian private property rights which it ought to have respected in Tarapaca; and upon the conduct of Chile regarding the clauses of the treaty of Ancon which refer to the creditors of Peru. The urgency of the necessity of publishing this pamphlet has not permitted us to gather the facts concerning these two important matters which we will take up later in a supplementary study.

Chapter VIII.

The Indivisibility of the Treaty of Ancon. Its Total Nullity Due to the Violation of the Third Clause.

Pursuant to international law, if a treaty is violated by one of the parties, the other is released from the obligation to perform it.

As some practical minds, in the face of this rule, oppose the erroneous idea of the partial nullity of treaties, it is convenient for us to consider the origin and evolution, through the history of international science, of the principle which we invoke. Vattel, speaking precisely of the treaty of peace, says:

> "It is asked if the violation of one article only of a treaty can result in its entire breach. Some have distinguished between the various articles and state the opinion that if a treaty is violated in some of those articles, the peace subsists respecting the others. But Grotius' opinion seems to me evidently founded on the nature and spirit of treaties of peace. This great man says: 'that all the articles of a treaty of peace are intertwined conditionally as if it had been formally said: I will do this or the other thing provided that you on your part do this or the the other thing.' "—Droit de Gens, p. 751.

One of the authors to whom Vattel refers is Wolf, who maintained the strange theory by virtue of which the various articles of a treaty ought to be considered as so many particular treaties made at the same time. Vattel has rightly declared this doctrine absolutely unsustainable. "Even although the immediate bond between some of the articles be not

seen," says he, "they are united by the common compensatory relation in view of which the contracting parties adopt them. All of that which is comprised in one treaty has the nature and force of reciprocal promises unless this has been formally excepted."

The writers subsequent to Vattel have done nothing other than to reaffirm the principle set by him in conformity with the thought of Hugo Grotius, the founder of international science.

Vattel does not accept the distinction later made by Pinheiro Ferreira between the essential and non-essential articles which weakens the efficacy of the principle. Let us hear the master once more:

> "It is no less useless to think of distinguishing here between the articles of great importance and those which are of small importance; under the law strictly interpreted, the violation of the least important article releases the party damnified from the obligation to perform the others, because, as we have just seen, they are bound the ones to the others conditionally. Besides, what a source of dispute such a distinction would give rise to! Who will decide the importance of the article violated?"—Droit de Gens, p. 758.

We will see how that differentiation made by Pinheiro Ferreira and later reproduced by Calvo is disapproved by the majority of authors.

The principle of indivisibility of treaties not only was incorporated in the law but made uniform the practical relations of peoples to the point that when the parties, on signing a treaty of peace or any kind of a treaty, wished to prevent its total annulment

as a consequence of the violation of one of these articles they expressly explained this circumstance in the clause called "de mantenu."

Vattel says:

> "It is added, with reason, that when it is desired that the agreement do not lose its force the express clause is added that even in case one of the articles of the treaty be violated the others shall not cease to subsist in full force. An agreement may doubtless be made on this matter; it may even be agreed that the violation of an article shall not cause the nullity of those corresponding to it and which are as its equivalent. But if this clause is not found expressly stated in the treaty of peace, the violation of a sole article endangers the whole treaty as we have proved on speaking of treaties in general." —Droit de Gens, p. 752.

Nys confirms the foregoing in the following words:

> "Among the stipulations concerning the execution of treaties and imagined by diplomacy there used to be that known as 'de mantenu'; it was expressly declared that every infraction of the peace would be prosecuted and satisfaction given therefor and that it would not cause the caducity of the peace."—Droit International, 1912, p. 754.

The invention of the clause aforesaid reaffirms the force and the prestige of the principle of indivisibility.

In the face of the violation of the treaty of peace by one of the contracting parties, the other has the right of declaring the treaty broken or of letting it subsist. (Vattel, Droit de Gens, p. 756.)

Modern writers such as De Louter and Oppenheim repeat the same concepts. The former says:

> "The treaty of peace, as all international conventions, rests on good faith and supposes the sincere intention of strictly performing its stipulations. The peace is indivisible and unconditional, that is, it must be executed completely in all its parts and without any reserve. A voluntary violation is called breach of the peace."—J. De Louter, Le Droit International Positif, Vol. 2, 1920, p. 385.

Breach of Treaty of Peace.

Section 278. Just as is the performance, so is the breach of peace treaties of great importance. A peace treaty can be violated in its entirety, or in one of its stipulations only. Violation by one of the parties does not ipso facto cancel the treaty; but the other party may cancel it on this ground. Just as with violation of treaties in general, so with violations of treaties of peace, some publicists maintain that a distinction must be drawn between essential and non-essential stipulations, and that only violation of essential stipulations creates a right for the other party to cancel the treaty of peace. It has been shown above, that the majority of publicist rightly oppose the distinction.—"International Law," Oppenheim, Vol. 2 (1921)—War and Neutrality, p. 372.

The treaty of peace is, therefore, the same in every respect as the synalagmatic treaties in general respecting which the indivisibility is not discussed.

Let us follow step by step the reaffirmation of this principle in the development of international law. Wheaton says:

> The violation of any one article of the treaty is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other. A violation of any single article abrogates the whole treaty, if the injured party so elects to consider it. This may, however, be prevented by an express stipulation, that if one article be broken, the others shall nevertheless continue in full force. If the treaty is violated by one of the contracting parties, either by proceedings incompatible with its general spirit, or by a specific breach of any one of its articles, it becomes not absolutely void, but voidable at the election of the injured party. If he prefers not to come to a rupture, the treaty remains valid and obligatory. He may waive or remit the infraction committed, or he may demand a just satisfaction. (2)—Wheaton's International Law, 1855, p. 621.

Pomeroy, in his International Law, states the same principle.

Field, in his International Code, 1876, page 82, article 202, considers the extinction of international obligations "by the breach of the stipulations by the nation bound to fulfill them."

Woseley, 1878, at page 180, affirms the same principle.

Bluntschli recognizes the termination of treaties by the dissolving condition subsequent. (Le Droit International, 1881, p. 266, article 454.)

Pradier Fodere discusses at length the concept of the dissolving condition subsequent, making the distinction between the express dissolving condition subsequent and the tacit dissolving condition subsequent

which exists in all the synalagmatic contracts for the cases in which one of the parties does not fulfill its obligation. Regarding international law, he says that when the treaties are made with an express dissolving condition subsequent and the latter happens, they cease to be binding as under the civil law, but that as to the happening of a tacit dissolving condition subsequent consisting in one party's not performing its obligations, it is useless to recall that it cannot give rise to any action. But, he adds: "The party damnified by the fault of a power which has refused to perform a treaty can rightfully consider itself released from it if it sees fit to do so. It is up to the contracting parties only to appreciate the importance of infractions of the treaty and to decide whether or not they refer to accessory clauses which can be derogated or modified without altering the ensemble of the stipulations or whether violation of essential clauses, the non-performance of which implies the violation of the treaty, are involved." (P. Pradier Fodere, Droit International Public, 1865, p. 919.)

Calvo affirms the same principle, stating the following:

> "A treaty may terminate prior to the time fixed for its duration when, without the causes of modification and annulment, which we have just indicated, one of the parties refuses to abide by its obligations, thus implicitly giving the other the right of freeing itself in like manner. In general, if the agreement is considered as an indivisible whole, it must be admitted that such a refusal does not refer to one point only,

but causes the caducity of the entire treaty by virtue of the axiom that the principal thing involves the accessory thing."—Droit International, 1887, p. 401.

Phillimore says the same (Com. DXCVII).

Glenn, in his International Law, 1895, at page 153, says:

> 110. A treaty is voidable under the following circumstances: (e) When there is a breach by one of the parties. But the effect, when there is a breach of one or more clauses only, depends upon the circumstances of each case.

Rivier, in his Principles of International Law, 1896, at page 195, says the following:

> "The non-performance of a treaty by one of the contracting States gives the other the right of deeming itself released or of exacting damages and interests. The indivisibility recovers here the predominant position. If some one of the clauses, even of those which seem of least importance, is violated, there is no longer any security as to the others. It may be said that each clause constitutes a condition of all the others. There is no room for distinguishing between the principal and accessory, connected or disconnected, articles. All the articles have the same value. They constitute an indivisible whole."

The genial Westlake also inclines to this criterion although he understands that the right of denouncing a treaty exacts a better definition than can be reached in the present state of international law. He agrees, however, that it cannot be condemned but exercised

with a grave sense of moral responsibility. (International Law, 1904, p. 284.)

Merignac, in his Traite de Droit International, 1907, at page 789, says the indentical thing:

> "If one of the parties does not perform its obligations the other has the right, as in every synalagmatic contract, after demands without result, to denounce the treaty. Each State then, freely and under its own responsibility, decides what conduct it ought to follow in the face of the resistance of the other contracting party."

Despagnet and De Boeck (Cours de Droit International Public, 1910, page 706) also affirm the indivisibility although they incline to consider it existent in grave cases only. The following are their words, at page 948, referring precisely to the treaty of peace:

> "The non-performance by one of the contracting parties cannot result in the breach of peace except when it is sufficiently grave and persists in spite of the reclamations. It is, besides, a question of the appreciation of a question of fact, which appreciation varies according to circumstances and according to the interest that may be had in the maintenance or in the breach of peace."

As is seen, the authors hitherto cited fully accept the principle of indivisibility, in spite of their prudential reservations, and exact only the grave nature of the breach and the reclamations of the party damnified to secure the fulfillment of the treaty before declaring its caducity.

Bevilaqua affirms the principle in a more categorical way in his Direito Publico International, 1911, at page 39:

> "The non-performance of a treaty by one of the contracting parties entitles the other to the rescision."

The identical rule is accepted by Nys in his Droit International, 1912, at page 531, following in this Rivier. He considers the articles of a treaty as an indivisible whole.

Bonfils, in his Droit International, 1912, at page 547, reiterates the same rule in the precise manner which is peculiar to him:

> "The non-performance by one of the contracting parties entitles the other to be released from its obligations. Public treaties, being synalagmatic contracts, have a tacit dissolving condition subsequent as do the synalagmatic agreements under the civil law, but with an important small difference, however. Under the civil law the non-performance of the agreement by one of the parties entitles the other only to interpose a judicial action to the end of obtaining a rescision and damages. In public international law, in the absence of a common judicial power superior to the States, each State appreciates, freely and on its own account and risk, whether or not it can consider itself released from its obligations due to the non-performance, frequently partial, and sometimes total, imputable to the other contracting States."

The same principle of the tacit dissolving condition subsequent is affirmed by Julio Diena in his Diritto Internazionale, 1914, at page 432.

Foulke, in his International Law, 1920, at page 444, although he appreciates, as do the authors previously cited, the difficulty arising from the lack of an international tribunal, cannot but acknowledge that treaties are entire contracts in which the articles depend the ones on the others and have the force of reciprocal conditions.

De Louter, cited by us with reference to the treaty of peace, accepts the principle without differentiating the principal and essential clauses in view of the lack of an international tribunal, and the only thing which he exacts is that the right of denouncement be exercised within a reasonable time.

Oppenheim follows the same opinion in Volume 1 of his aforementioned work, at page 626.

This rapid review proves to us that, with the exception of Wolf, in former times, followed by Funck Brentano and Sorel, in modern times, the authors agree concerning the principle of the indivisibility of treaties, especially of the treaty of peace. The only discrepancy consists in the reservation made by a minority that the breach of accessory or secondary clauses ought not to be deemed to cause the nullity of the entire treaty.

This reservation neither endangers nor renders equivocal the application of the principle.

Hall has found the practical criterion to establish a clear difference between the essential and non-essential clauses. He says, literally:

> All that can be done is to try to find a test which shall enable a candid mind to judge whether the right of repudiating a treaty has

arisen in a given case. Such a test may be found in the main object of a treaty. There can be no question that the breach of a stipulation which is material to the main object, or if there are several to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract; but it would be seldom that the infraction of an article which is either disconnected from the main object, or is unimportant, whether originally or by change of circumstances, with respect to it, could in fairness absolve the other party from performance of his share of the rest of the agreement though if he had suffered any appreciable harm through the breach he would have a right to exact reparation and an end might be put to the treaty as respects the subject-matter of the broken stipulation. It would of course be otherwise if it could be shown that a particular stipulation, though not apparently connected with the main object of the treaty, formed a material part of the consideration paid by one of the parties.—International Law, Seventh Edition (1917) W. E. Hall Cont'd, p. 361.

According to this author, who is considered one of the principal authorities on this point and on the clause "rebus sic estantibus," total nullity ensues in case of the violation of one of the articles of the treaty of peace which refers apparently or implicitly to the objects considered by either party on making the treaty; and the partial nullity of the secondary clauses ensues when they have been violated.

Taylor, in his International Public Law, 1901, at page 402, follows exactly the same criterion, quoting Hall's words.

It is convenient that we reinforce our arguments by citing some precedents of the nullity of treaties due to violation by one of the parties. The diplomatic history of the United States offers us very interesting examples which contain the emphatical expression of this doctrine by the highest legislative, judicial, diplomatic and scientific authorities of this Republic.

The famous Kent said:

> But then they become newly acquired rights, and partake of the operation and result of the new war. To recommence a war, by breach of the articles of a treaty of peace, is deemed much more odious than to provoke a war by some new demand and aggression; for the latter is simply injustice, but, in the former case, the party is guilty both of perfidy and injustice. The violation of any one article of a treaty, is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other; and a violation of any single article overthrows the whole treaty, if the injured party elects so to consider it. This may, however, be prevented by an express provision, that if one article be broken, the others shall, nevertheless, continue in full force. There is a strong instance in the history of the United States of the annihilation of treaties by the act of the injured party. In 1798, the Congress of that country declared that the treaties with France were no longer obligatory on the United States, as they had been repeatedly violated on the part of the French Government, and all just claims for reparation refused.—International Law, Kent (1866) p. 420.

The resolution of Congress which annulled the treaties is the following:

> "Whereas the treaties concluded between the United States and France have been repeatedly violated on the part of the French Government, and the just claims of the United States for reparation of the injuries so committed have been refused, and their attempts to negotiate an amicable adjustment of all complaints between the two nations have been repelled with great indignity; and whereas, under authority of the French Government, there is yet pursued against the United States a system of predatory violence, infracting the said treaties and hostile to the rights of a free and independent nation:
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States are of right freed and exonerated from the stipulations of the treaty and of the consular convention heretofore concluded between the United States and France, and that the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States.
>
> "Approved July, 7, 1798."—1 U. S. Stat. L, 578.—International Law Digest, Wharton 2nd Edition, 1887, p. 60.

And in spite of the fact that the foregoing annulling resolution had internal effect only, Marshall said, in the case of Chirac vs. Chirac, 2 Wheaton, 272: "There is no treaty in existence between the two countries."

The representatives of the United States sustained the nullity diplomatically. Let us see what Whar-

ton says in his International Law Digest, 1872, at page 60:

> The act of Congress was sustained by the American envoys, in a letter to the French envoys, dated at Paris, July 23, 1800, on the ground of prior violation by France. (Infra, sec. 248.) "It was remarked that a treaty, being a mutual compact, a palpable violation of it by one party did, by the law of nature and of nations, leave it optional with the other to renounce and declare the same to be no longer obligatory, and that of necessity, there being no common tribunal to which they could appeal, the remaining party must decide whether there had been such violation on the other part as to justify its renunciation. For a wrong decision it would doubtless be responsible to the injured party, and might give cause for war; but even in such case its act of public renunciation, being an act within its competence, would not be a void, but a valid act, and other nations whose rights might thereby be beneficially affected would so regard it.
>
> That it has become impossible for the United States to save their commerce from the depredations of French cruisers but by resorting to defensive measures; and that as, by their Constitution, existing treaties were the supreme law of the land, and the judicial department, who must be governed by them, is not under the control of the executive or legislative, it was also impossible for them to legalize defensive measures, incompatible with the French Treaties while they continued to exist. Then it was that they were formally renounced. * * *
>
> "To the still further suggestion that the laws of nations admitted of a dissolution of treaties

only by mutual consent of war, it was remarked by the undersigned that their conviction was clearly otherwise, and that Vattel in particular the best approved of modern writers, not only held that a treaty violated by one party might for that reason, be renounced by the other, but that where there were two treaties between the same parties, one might be rendered void in that way, and the other remain in force; whereas when war dissolves, it dissolves all treaties between the parties at the time."—Messrs. Ellsworth, Davie, and Murray to the French negotiators, July 23, 1800, Sen. Ex. Dec. 1021, 19th Cong., 1st Sess., pp. 612, 613. See infra section 148.

Referring to the contention advanced in Court that the treaty of 1783 had been suspended and abrogated by the attitude of Great Britain on not executing certain parts of it, Judge Iradell said:

> "It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void. If Congress, therefore (who, I conceive, alone have such authority under our government), shall make such a declaration, . . . I shall deem it my duty to regard the treaty as void, . . . But the same law of nations tells me, that until that declaration be made, I must regard it (in the language of the law) valid and obligatory."—Ware v. Hylton (1796), 3 Dallas, 199, 261.

Referring to the same treaty of 1783 with Great Britain, Madison, accepting the traditional theory, affirmed the right of annulling it; but he added that the act of annulment ought to be performed not only

by the Senate and the President but also by the entire legislative body.

That great American said:

> "That a breach on one side (even of a single article, each being considered as a condition of every other article) discharges the other, is as little questionable; but with this reservation, that the other side is at liberty to take advantage or not of the breach, as dissolving the treaty. Hence I infer that the treaty with Great Britain, which has not been annulled by mutual consent, must be regarded as in full force by all on whom its execution in the United States depends, until it shall be declared by the party to whom a right has accrued by the breach of the other party to declare, that advantage is taken of the breach, and the treaty is annulled accordingly. In case it should be advisable to take advantage of the adverse breach, a question may perhaps be started whether the power vested by the Constitution with respect to treaties in the President and Senate makes them the competent judges, or whether, as the treaty is a law, the whole legislature are to judge of its annulment, or whether, in case the President and Senate be competent in ordinary treaties, the legislative authority be requisite to annul a treaty of peace, as being equivalent to a declaration of war, to which that authority alone by our constitution, is competent."—Mr. Madison to Mr. Edmund Pendleton, Jan. 2, 1791, 1 Madison's Works, 523, 524.

Madison's doctrine concerning the optional right of the party damnified by the violation of a treaty to annual it or to keep it in force is upheld by Kent. The latter says:

> "Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty *being, in such case, not absolutely void, but voidable, at the election* of the injured party, who may waive, or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent's Comm. 174."

The United States, pursuant to that optional right which appears in its diplomatic tradition, in some cases did not decide to annul the treaties which had been violated and permitted their continuation. Such was the case of the Clayton-Bulwer Treaty of 1850, in which they abandoned their right to terminate the pact.

In 1917, due to the European war, an analogous case presented itself in the violation of the treaty with Germany by the latter country. Although the American Government did not declare the nullity, Secretary Lansing again affirmed the traditional theory which confers the right of denouncing a treaty on account of the violation of one of its parts.

Secretary Lansing said:

> "It would be manifestly unjust and inequitable to require one party to any agreement to observe its stipulations and to permit the other party to disregard them. It would appear that the mutuality of the undertaking has been destroyed by the conduct of the German authorities." See Jesse S. Reeves, "The Prussian-American Treaties," Am. J., XI, 475, 501-507.

Cheney Hyde, in his International Law, Chiefly as Interpreted and Applied by the United States, Vol. 2, at page 82, summarizes the doctrine consecrated not only by the principles of science but also by the practice of this Republic:

> It may be futile to attempt to enunciate rules pointing decisively to the circumstances when abrogation by one party is to be excused. It is to be acknowledged, however, that failure of a contracting State to observe a material stipulation of its agreement is deemed to justify another party to take such a step.

To end this chapter, suffice it to say that the nullity of a treaty, on account of the violation of one of its stipulations by one of the contracting parties, has been accepted by the Chilean diplomats and authors. Gonzalo Bulnes, referring to Maximo Lira, says that the latter declared that the treaty of Ancon is one in all its parts and that one of its dispositions cannot be violated without affecting the others. All the dispositions, said Lira, form an indivisible whole. Each one of them is incorporated in the others and any one of them is a condition of the rest. The note of Plenipotentiary Lira to which Bulnes refers contained interesting quotations from Grotius, Calvo, Bluntschli and Wheaton.

Mr. Migel Cruchaga, in his International Law, at page 307, also affirms the principle of the indivisibility of treaties on saying that the treaty of August 6, 1874 having been broken because Bolivia had not fulfilled the stipulated obligations, Chile regained the rights which it legitimately asserted prior to the treaty of 1866.

Orrego Luco declares emphatically:

> . . . If, according to civil law, the non-fulfilment by one of the parties gives to the other the right to rescind a contract, this right applies, with even greater propriety, to contracts of an international nature, which possess greater solemnity and importance, deal with complex and higher interests, are concluded with greater deliberation and with a deeper investigation.
>
> If the breaking of a private contract is a grave matter, that which refers to an international agreement is exceedingly grave and confers on the other side the right to reassume its original juridical status, always provided that the stipulations agreed upon should not have been fulfilled.—Luis Orrego Luco, Minister of Justice, Publicist, "The International Problems of Chile," Santiago, 1900.

To sum up, we can affirm the indivisible unity of the treaty of Ancon not only by reason of the scientific principles and precedents of American public law which we have recalled but by the explicit acceptance of that character on the part of Chile itself.

Chapter IX.

The Juridical Solution of the Problem Created by the Violations of the Treaty of Ancon.

We have proven that the treaty of Ancon is one and indivisible and that Chile has violated the third clause producing the total nullity of the pact. Peru's right to declare that nullity is clear. Even the most prudent and conservative of internationalists exact as conditions of the right to make that declaration the two following only: first, that the violations be grave; and second, that the party damnified have requested the other party to fulfill the treaty. Those conditions have happened in the present case as regards Peru.

The indefinite postponement of the plebiscite, the expulsion en masse of the Peruvian population not only from Tacna and Arica but from Tarapaca, the Tarata question, and the substitution of martial law for the regime of Chilean legislation as well as the acts of sovereignty which Chile has usurped while being simply the possessor, have a character of unquestionable graveness.

No one can doubt, respecting the treaty of Ancon, that all that referring to the provinces of Tacna and Arica constituted for Peru the principal object of the agreement. It is sufficient to recall that the war was prolonged on account of these provinces and that the discussions of the negotiators dealt principally with them. We refer to the following documents: The Bases Proposed to General Iglesias and Rejected by Him, and the Declarations of Mr.

Novoa Concerning the Attitude of the Peruvian Negotiators regarding Tacna and Arica. (Documentos Esenciales del Debate Peruano-Chileno, Ds. 40 and 41, respectively.)

The second condition, namely, the requests made to Chile to perform the treaty need not be proven either. There is the history of the negotiations. There has not been any Peruvian mission accredited before the Government of Santiago, between 1892 and 1910, which did not have for its exclusive object the asking of Chile for an agreement as to the plebiscite and the discontinuance of and satisfaction for the measures which, in violation of the pact, it dictated regarding Tacna and Arica.

Peru's constancy and patience have been exemplary in this matter. When the policy called chilenization was started, the Peruvian plenipotentiary, Mr. Chacaltana, addressed repeated notes to the Santiago Chancellery; the latter delayed the answers indefinitely only to answer finally in the negative or evasively. It was only after the rejection of the treaty of 1898 that Peru decided to break off the diplomatic relations with Chile, denouncing to America "the situation which was arising in the origin and subsistence of which it had no responsibility."

Owing to the Chilean-Bolivian treaty of 1904, Peru again let its protests be heard. Diplomatic negotiations were then initiated which meant new efforts on the part of Peru to the end of inducing Chile to fulfill the pacts. Those negotiations were prolonged fruitlessly until 1910.

Chile maintained itself invariably inflexible in its line of conduct of ignoring the treaty and the Peruvian reclamations. The outrages and violence continued to become graver until finally the breach of diplomatic relations was produced.

The juridical situation which arose between the two countries was practically a situation of war without military hostilities. Chile continued to persecute the Peruvian population. Peru's repeated protests reserved its rights to the denouncement of the pact. The definitive proclamation of that denouncement did not follow immediately, however, Peru preferring to follow a line of prudent expectation in spite of the fact that there was no hope that Chile would change its course and would be inclined to give satisfaction for the damages caused and to fulfill the pact.

The European war caused in Chile an affirmance of the latter's imperialistic policy. The Chilean people and Government believed in the German victory. The cause which was being argued in Europe between the Allies and the Central Empires was the same involved in the dispute between Peru and Chile.

On the cessation of the war by the victory of democracy and the principle of nationalities, the Chilean Government ought to have become reasonable and to have understood that an atmosphere had been created in the world which was precisely contrary to that which it expected to consolidate its second conquest, namely, that of Tacna and Arica. But instead of this, immediately following the armistice,

as a result of rancor and spite, the crimes which were being committed in Tacna, Arica and Tarapaca increased. The expulsion en masse of the remainder of the Peruvian population from the unlawfully held territories was then decided upon.

The consular relations between Peru and Chile were broken. The moment had arrived of exercising the unquestionable right which we had of declaring the treaty null. Peru had fulfilled even excessively the obligation of requesting Chile to perform the treaty. And this country had already committed its last outrages against the Peruvian population of the southern territories.

The Peruvian petition for the revision of the treaty was presented to the League of Nations. Peru has withdrawn it temporarily, reserving the right of presenting it again at a more opportune time.

The Peruvian Constituent Assembly of 1919 gave entire solemnity to the denouncement of the treaty by adopting a resolution as to its caducity identical in its spirit and similar in its form to the resolution adopted by the American Congress concerning the annulment of the treaties with France, which resolution we have quoted. In full conformity with that resolution of the Assembly, the Peruvian Department of State said in the Exposition of 1921:

> "It follows clearly and definitively, from the reasons contained in this Exposition: first, that the treaty of peace signed by Peru and Chile on October 20, 1883, must be revised and the province of Tarapaca returned to Peru unconditionally; second, that the provinces of Tacna and Arica must likewise be returned to Peru

without any kind of indemnity or payment on its part."

Although Peru could juridically have declared the nullity of the treaty from the moment when Chile withdrew its approval of the pact of 1898 concerning the bases of the plebiscite and accentuated the policy called chilenization, not to have done it then and to have followed the policy of urging Chile until the exhaustion of all efforts does credit to its cause morally.

The atmosphere of international justice which the great war created did not exist at that moment, and the practical way of reaching the juridical solution of the problem which the denouncement should create was not open.

The favorable opportunity has presented itself afterwards. The League of Nations' covenant which Chile had found itself obliged to accept against its will creates a juridical bond and a situation within which solutions of law are possible. Even aside from the League, a principle of international solidarity has been affirmed in America, as a consequence of the war, which today permits the frankest and most radical treatment of all questions, a treatment which in former times would have disturbed the peace of the continent.

In the face of the Peruvian thesis regarding the breach of the treaty and its caducity, Chile sustains the theory of performing it within the interpretation which it gives it and pretends that a veil be drawn over the time elapsed and the violations committed during it.

In spite of the radical opposition between the Peruvian and the Chilean theses, they have a point in common. We all agree that there are stipulations in the treaty of Ancon, essential stipulations, which have not been fulfilled.

The difference lies in the origin and consequences of that non-fulfillment. Peru affirms the responsibility of Chile and the consequent effects on the general validity of the treaty. Chile attributes the non-fulfillment to the material impossibility of an agreement as to the means of execution of the pact.

These differences are matter proper for arbitration which must comprise not only the point of view of one of the parties, but, in the alternative, the points of view of both.

The judicial solution to which Peru and Chile are bound as members of the League of Nations has been recommended for these cases by all the authors.

They all agree that every dispute regarding the violation of agreements is matter proper for arbitration.

Let us see what Bernard says, in his famous Lectures on Diplomacy, 1868, page 174:

> On the question then, whether an alleged contract is or is not a Treaty, International Law can and usually does speak pretty plainly, and it assumes the general rule that Treaties are binding. The practice of making Treaties is necessarily based on that assumption. But there may be exceptions to that rule, and particular difficulties in applying it; and hence arise classes of questions on which International Law does not, and cannot, speak plainly. Is

the Treaty itself unjust to third parties, or to any of the contracting parties themselves? Was it extorted by unjust violence, or procured by duplicity? Has the obligation been dissolved by the act of either party, or extinguished by change of circumstances? What stipulations are to be deemed important, so that a breach of one will discharge the others? In disputes about the causes foederis—where, for example, your ally demands your aid, and you believe him to be in the wrong—what is to be done?

Here is a handful of questions of different sorts, which have this in common, that general rules can go but a little way in disposing of them. What they demand is an arbiter. There are under every system of private law, beside the general mass of ordinary questions of fact, questions such as these—what constitutes reasonable care, reasonable time, a bona fide belief, ordinary prudence or firmness, undue influence, gross hardship, and the like—which law is obliged to surrender practically to unassisted common sense. The chief service it performs in such cases is to provide a disinterested arbiter whose decision is final.

We have seen in the foregoing quotations that the general practice of arbitration is rendering the problem which the violation of treaties or their denouncement for non-fulfillment create, less grave. The problem shall be solved by establishing a judicial procedure, such as Fiore proposes, for all cases of derogation of treaties.

Let us recall the principles which the latter has set forth in this regard in his Codified International Law, annotated by Borchard, 1918, at page 348:

Judicial Proceedings for the Abrogation of a Treaty.

831. The abrogation of a treaty ought to be pronounced by a competent court, at the formal instance of a signatory party.

832. The right of a party to request the annulment of a treaty must be considered as well founded, when it is proved and recognized that the treaty lacks one of the essential conditions required by international law for its validity.

The judicial or arbitral solution is recommended also by Denis P. Miers in his monograph on the violation of treaties. Let us hear his words:

> "These closely connected forms of notation are particularly dangerous to international order (dealing with non-execution and disregard). As to separate engagements, no grave question is likely to arise from them, because the injured contractant is sure to complain and the resulting negotiations, reclamation or arbitration is almost certain to satisfy both."—A. J. I. L., p. 11, 806.

Cheney Hyde, in his aforementioned work, at page 88, says the following which has perfect application to the present case:

> Disagreement between the parties concerning the interpretation of a treaty may give rise to controversy as to whether such a stipulation has been broken. Thus the very existence of conditions sufficing to justify repudiation may be sincerely questioned by the party whose conduct is regarded by another as warranting such action. Should there be habitual recourse to arbitration, either through the voluntary or constrained action of the parties, in cases involving

the interpretation of a treaty where no other amicable means sufficed to bring about accord, the resulting practice would check the success of the effort of dishonest States to utilize colorable grounds as a pretext for disregarding their contractual obligations.

It may be observed that the Covenant of the League of Nations imposes sharp penalties upon a member which resorts to war in disregard of certain specified undertakings pertaining to the adjustment of international disputes. It is significant that the check upon recourse to such a mode of self-help is designed to leave little room for the contention of a contracting State that circumstances have justified its abrogation of obligations under the Covenant.

There is not the least doubt, then, that, at the present international moment, the party that interposes a reclamation on account of the violation of a treaty and asks its revision or nullity is not bound, as at the time which Koch considered, to declare war as a logical consequence of the denouncement but to petition for the arbitration and the application of the rules of law.

In this arbitration the difficulty lies in fixing the terms of the agreement. The culpable party will make every effort to obtain the exclusion from the agreement of the facts which its culpability involves and to limit or exclude the power of the arbiter to expressly declare it.

Thus, the arbitral solution would appear to be impossible. The remedy is also prescribed by the science. It consists in giving the arbiter the right of fixing the terms of the agreement. Bonfils, in his

aforementioned work, at page 611, says in this respect:

> "Some are of opinion that the tribunal has no right to establish its own jurisdiction. An agent could not himself fix the meaning and extent of his authority. If doubts arise the arbiters must resort to their principals and ask them for the enhancement of their powers and the clearer fixation of the object of the agreement. Others think differently. At common law, the tribunal to which a dispute is submitted, has the right of examining whether or not it is within its jurisdiction as established by law. Why should not the same happen in the case of an arbitral tribunal? The only difference lies that instead of the law it is the agreement that has to be interpreted. . . .
>
> "The Hague Conventions of 1907 and 1909 have consecrated the latter opinion in articles 48 and 73. The tribunal is authorized to determine its jurisdiction interpreting the agreement, as well as the other treaties that may be invoked in the matter, and invoking the principles of law."

With regard to the constitution of the permanent court, article 53 of the Hague Convention says:

> "The permanent court is competent to fix the terms of the agreement if the parties resort to it for that purpose."

This has permitted De Louter in Volume 2 of his aforementioned work, at page 153, to affirm the following:

> "The jurisdiction of the arbitral court is fixed by the agreement and outside of that it may be determined by the court itself."

The objection will be made that it is difficult to have the States give the arbiter so much authority, but this objection disappears if it is taken into account that the trend of ideas on international law and the constitution of the League of Nations, as well as the frequency of international conferences, result in the presentment of problems by the simple petition of the parties.

In a perhaps not far off future, it will be the simple presentment by one party that will establish the jurisdiction of the judge or tribunal, without need of resorting to the signing of an agreement of which the stronger country may avail itself to elude or restrict the settlement of an international problem.

As to the nature of the arbitration, it is evident that, it being a matter of the non-fulfillment of international pacts, there is room for none other than the judicial arbitration.

The objections which writers make generally to the equity arbitration are accentuated as regards the application of that recourse to problems strictly of law as are those which arise from the non-fulfillment of treaties. Jolin Jaquemins, quoted by Bonfils in his aforementioned work at page 612, said:

> "It would be to falsify this notion, that is, the application of international law, and to endanger this application to admit beforehand in the agreement itself the possibility of a solution dictated not by law but by the arbitrary appreciation of the conveniences of the parties."

Continuing this train of thought Jaquemins shows that an equity arbiter chooses the easy way of divid-

ing the difference into two. Then pointing out another danger he adds:

> "However little the clause of amicable composition be used in some agreements, it shall not be long in becoming usual, and, when the arbiter propose it, it shall seem incorrect and impolite to refuse it. And if the arbiter is the sovereign of a great State, it shall not be possible to make such refusal without serious inconvenience. On the other hand, the contracting party that propose and wish the clause of amicable composition shall be that one of the two that be less sure of its right."

Experience has proved, besides, that equity arbitrations result in solutions without moral authority and have produced in many cases the grave effect of causing the principle of arbitration to lose prestige.

Hence it is not possible under any concept to admit any arbitration other than the juridical arbitration for the solution of the problem of the Pacific.

We have not, in this chapter, considered the possibility of deciding the problem created by the nonfulfillment of the treaty of Ancon without the difficulties of an arbitral agreement.

We have recalled that Peru and Chile are members of the League of Nations and that Peru presented before it the petition for the revision of the treaty.

Chile has denied the jurisdiction of the League over this petition as well as over that presented by Bolivia concerning the revision of the treaty of 1904.

Dr. Victor M. Maurtua, in his recent book, has proved in a definite manner that the League has

jurisdiction over these matters, upholding the correct interpretation of article 19. The Chilean Delegation denies that jurisdiction, relying on doctrines which involve practically the annulment of said article and which reduce the powers of the League, as regards conflicts of this nature, to such an extent that the institution created by the treaty of Versailles is completely falsified.

Whatever be the obstacles that may be found in the evolution of international law, it is already clear that the points relative to the non-fulfillment of international treaties and their denouncement shall find a solution of law through the existing League of Nations or through the system of conferences or conversations prior to the breaking out of the conflict or through the influence of an institution, such as the association of nations planned by President Harding, which may replace or comprise the present League.

The very invitation of President Harding to the Governments of Peru and Chile is proving to us the truth of our assertion. Whatever be the success of these conferences, the current of opinion which exists in America towards the solution of the questions pending among the American countries, by reason and not by force, as Secretary Hughes has said, shall not be checked.

We need not consider the reasons that the Peruvian Delegation at Washington may have had for modfying the petition which Peru presented to the League of Nations and withdrew provisionally, reserving to itself the right of presenting it at another time, and for proceeding in discordance with the

declarations of the Peruvian Constituent Assembly and with the last documents of that Country's Chancellery, by petitioning for the arbitration concerning Tacna and Arica only; but we must say that such a modification of the terms of the problem, Chile not having accepted the proposed arbitration, cannot modify nor compromise our right to sustain the nullity of the treaty.

The Peruvian formula, unfortunately wrongly expressed, which involves the partial nullity of the treaty only, that is, the caducity of the third clause, is explained only by the concept of a kind of tacit agreement between the two countries to give up their original positions: that of strict right by Peru and that of advanced imperialism by Chile; tacit agreement which the Chilean Delegation, following the tradition of disloyalty and duplicity of the diplomacy of Chile, has violated. This being the concept which the presentation of that transactional formula has inspired, it can be affirmed that it does not bind Peru absolutely and that it does so even less after Chile, maintaining itself firm on the point relative to the plebiscitary procedure, has rejected the arbitration restricted to the third clause.

The American opinion to the effect that that plebiscite, even though held within the rules which an impartial arbiter should fix, would be, after the postponement for twenty-eight years during which Chile has transformed the conditions of the territory radically and violently, the consecration of a conquest under the cover of a doubly hypocritical cloak of a

Treaty: 1884
Plebiscite: 1894 (supposedly)
+ 28 years
= 1922

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procedural arbitration and of a delayed vote, needs no illustration.

The principle of arbitration restricted to the plebiscitary procedure can neither cover nor render legitimate the offenses committed during such a long period of time nor the flagrant violations of the pact. Such an arbitration would be simply to procure the authorized and impartial legalization of the policy called chilenization.

Peru cannot accept transactions nor discussions on the secondary ground of the material interests or of the political conveniences. The Peruvian national sentiment does not desire but the total settlement of the problem of the Pacific by means of a juridical solution and would consider the very arbitration proposed by its delegation as a national misfortune.

There is no advantage for Peru in hastening the solution of this problem. From the juridical point of view, the slow but sure evolution of international justice is favorable to it. From the point of view of the influences of another nature, the development of its economic forces and of its still untouched resources, present to it an alluring future of culture and of power.

Very different is the interest of Chile. The petitions of Bolivia and Peru to the League of Nations, the latter withdrawn provisionally, and the former postponed, have destroyed, from the juridical point of view, the situation which was created for Chile by the pacts of 1883 and of 1904 which Chile itself has violated.

To maintain a situation of fact as a substitute

for a juridical situation which has ceased, the Government of Chile is compelled to continue the policy of armaments which it initiated in America.

At the same time a serious economic crisis due to the permanent deficit, which amounts to more than half of its revenue, sets over that country. This fiscal situation is bound to result in a profound political crises.

The enormous injustices committed in the war of 1879, which injustices Chile could have attenuated by returning Tacna and Arica to Peru and giving a port to Bolivia, are aggravated by the lapse of time and cannot subsist.

The slow forces which elaborate the restoration of right are similar to those which silently work to repair the broken equilibrium of nature.

The ample judicial arbitration of the entire problem of the Pacific could settle in advance today what would unavoidably be the work of organic forces in a not far off future.

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